The Iqbal *Effect: the Impact of New Pleading Standards in Employment and Housing Discrimination Litigation.*

Forthcoming: 100 Kentucky Law Journal
Draft: October 8, 2011

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Electronic copy available at: http://ssrn.com/abstract=1941294

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ABSTRACT

In May 2009, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, a case brought by an immigrant of Pakistani descent caught up in the worldwide investigation that followed the horrific attacks of September 11, 2001. In that decision, the Court extended the "plausibility test" first introduced two years earlier, in *Bell Atlantic v. Twombly*, to all civil pleadings in federal court. That test requires that, in order to satisfy federal pleading requirements, a complaint must allege a plausible set of facts. But what is plausible in a given case may be in the eye of the beholder.

In the two years since the Court reached its decision in *Iqbal*, that opinion has been cited roughly 25,000 times. The empirical analysis contained in this study attempts to gauge the impact of *Iqbal* on civil rights cases, specifically cases involving allegations of employment and/or housing discrimination. While several other studies have attempted to answer similar questions, to date, no study has analyzed this impact with reference solely to motions based on the specificity of the pleadings: which is, of course, the central issue in *Twombly* and *Iqbal*. In addition, other studies looked exclusively at quantitative results, with no assessment of the manner in which the plausibility standard was being applied by the lower courts. This empirical study attempts to fill that gap in the empirical research.

This study identified over 1850 reported decisions on motions to dismiss in employment and housing discrimination cases filed in federal district court covering the years prior to and after the Court's decision in *Twombly*. From this group of cases, a smaller sub-set, totaling 634 cases, was identified by excluding those decisions—included in previous studies—that bore no relation to the issue of the specificity of the pleadings. Furthermore, despite this winnowing process, the sample size for this study was still considerably larger than those analyzed in previous studies.

This detailed study yielded the following results. Surprisingly, the dismissal rate in this class of cases during a set time-period immediately prior to the *Twombly* decision was actually slightly higher than the dismissal rate of decisions issued in the time period between issuance of the *Twombly* and *Iqbal* decisions, but then the rate increases considerably after *Iqbal*. The dismissal rates for all cases pre-*Twombly* was 61%; between *Twombly* and *Iqbal*, it was 56%; but then after *Iqbal*, it was 72%, an 18% increase from the pre-*Twombly* period analyzed.

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In addition, even more troubling, plaintiffs were far more likely after *Iqbal* than either before *Twombly* or immediately thereafter to face a motion to dismiss challenging the sufficiency of the pleadings in the cases analyzed. Indeed, decisions on such motions were generated only 12 times in the first quarter of 2004 (the first quarter analyzed in this study), but then 61 times in the third quarter of 2010 (the last full quarter analyzed): a greater than 500% increase.

Moreover, when it comes to the substance of these decisions, something else appears to be happening. Despite the increased dismissal rate following *Iqbal*, oddly, in a class of cases analyzed for this study, courts rarely invoked the plausibility standard in the same manner it was utilized by the Court in *Twombly* and *Iqbal*; that is, courts rarely found that dismissal was warranted if there was an arguably more plausible, and entirely legal, basis for the challenged conduct. Finally, and similarly, judges rarely, if ever, appear to invoke their own "experience and common sense," as urged to by the Court, when ruling on motions to dismiss in these cases.

These outcomes yield three conclusions. First, district courts are using the *Iqbal* precedent, though not necessarily *Twombly*, to dismiss employment and housing discrimination cases at an accelerated rate. Second, although courts may be invoking the *Twombly/Iqbal* plausibility standard in assessing the sufficiency of the pleadings in employment and housing discrimination cases, they are certainly not relying on or utilizing the plausibility standard as articulated in these two precedents. This suggests that the subjective elements of the plausibility standard may be infecting these outcomes. That is, if district court judges are dismissing cases at a higher rate post-*Iqbal*, yet are not relying on the guidance the Court has given such lower courts in how to deploy the plausibility standard, it would seem that such courts may feel emboldened to dismiss cases that might have survived such a motion had that motion been decided pre-*Iqbal*. Finally, regardless of whether there is a dramatic *Twombly* or *Iqbal* effect on outcomes, motions to dismiss challenging the sufficiency of the pleadings are much more common since *Iqbal*, which means that even if some plaintiffs are defeating such motions, it still comes at a price: it increases transactions costs in these cases, and may, as a result, have a chilling effect on lawyers contemplating bringing them in the first place.

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Raymond H. Brescia[*]

INTRODUCTION

For centuries, when dealing with the facts alleged by litigants in their pleadings, courts have struggled with the question: how much is enough; at what point does a pleading contain facts in sufficient detail to allow a case to proceed? For too long, common law pleading rules were rife with tricks and traps. Courts could dismiss cases for one pleading misstep or poorly turned phrase. Two major changes to pleading rules occurred over the last two hundred years: first, the adoption of the Field Code in New York State in the middle of the 19th Century led many states to either enact their own version of the Code or undertake procedural reform;[1] and, second, the adoption of the Federal Rules of Civil Procedure, in 1938. In this century, it would seem that we have already had our moment of change: a possible tectonic shift in the case law surrounding pleading requirements that is already having a profound impact on the courts and litigants across the country. This development in the law surrounding pleading standards—

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[1] The Field Code, named for David Dudley Field, the head of a law reform commission in New York State, was adopted in 1848, with almost all states adopting some form of civil procedure reform by the end of the century. For a discussion of the Field Code, see LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW, 392-390 (1985). See text accompanying notes 86 through 89.

making them more restrictive, and thus limiting access to the courts—is consistent with other, parallel trends in civil litigation in U.S. courts.

In what is swiftly becoming a landmark ruling, the Supreme Court, in May 2009, issued its decision in *Ashcroft v. Iqbal,*[2] a case brought by an immigrant of Pakistani descent caught up in the worldwide investigation that followed the horrific attacks of September 11, 2001. Iqbal filed the action against several high-level U.S. government officials, including then-Attorney General John Ashcroft and director of the Federal Bureau of Intelligence, Robert Mueller. The case did not stem from treatment of Mr. Iqbal while in detention on Guantanamo Bay, Cuba; he was never there. Nor did it involve allegations that Iqbal faced rendition to a "black site" somewhere in Eastern Europe; he had not. Rather, Mr. Iqbal's claim was based on the abusive treatment he received while held in a federal detention facility in Brooklyn, NY, after he had been detained by federal officials for alleged violations of immigration laws. Iqbal claimed that while he was in detention he was singled out for abusive treatment and that the defendants "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin."[3] Iqbal alleged that Ashcroft and Mueller knew of and condoned this treatment.[4]

The defendants in Iqbal's case challenged the sufficiency of the allegations in the complaint, and the Supreme Court found that many of those allegations were conclusory, and still others were not pled with sufficient detail to satisfy the requirements of the Federal Rules of Civil Procedure, specifically, Rule 8(a). In *Iqbal*, the Court built on a prior precedent from just two years earlier—*Bell Atlantic v. Twombly*[5]—which had imposed a "plausibility" requirement on civil pleadings in federal court: there, in the context of an anti-trust case.[6]

Since these precedents, the "plausibility standard," first articulated in *Twombly* and elaborated on in *Iqbal*, is now the yardstick against which all civil filings in federal court must be

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[2] Id.

[3] Id., at 1942.

[4] Id., at 1944 (citations omitted).

[5] 550 U.S. 544 (2007).

[6] In *Twombly*, the Court found that allegations of parallel conduct by several telecommunications companies as reflected in common price fluctuations in products and services sold by these companies, with nothing more, failed to meet the pleading requirement of the federal rules. The Court found that the claims of illegal conduct in that case were implausible given another, more likely reason for the similar conduct of market actors: e.g., that the market had caused similar price movements in the cost of telephone service, and not any illegal, conscious conduct of the defendants.

measured.[7] Moreover, some state courts have adopted the plausibility standard in assessing pleadings before them, despite the fact that the federal rules obviously do not apply in those jurisdictions.[8]

Despite this shift in pleading requirements, the Supreme Court has offered little guidance to the lower federal courts on the contours of the plausibility standard, nor has this standard proven durable or popular in substance with the lower trial courts. Indeed, as the oral argument in the *Iqbal* matter appears to reveal, even the Justices themselves seem somewhat unsure of the exact nature of the plausibility standard, or how to apply it. And to make matters worse, the Court placed its faith in federal judges' subjective views on pleadings, urging them to use their "experience and common sense" to determine whether a complaint pleads plausible facts.

Yet such a broad, subjective and vague standard is not only challenging to apply, but leaves lower courts with a wide range of discretion, a discretion that may prove not only difficult to wield but also dangerous to deploy.

It is hard to argue that the decisions in *Iqbal* and *Twombly* have not had a profound effect on litigants pursuing civil claims in federal court. At present, in the two years since the Court reached its decision in *Iqbal*, that opinion has been cited roughly 25,000 times. Several scholars and researchers with the federal judicial system have attempted to determine the impact that these pleading requirements have had on civil cases in general and civil rights cases in particular.[9] To date, these studies have yielded mixed

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[7] As the *Iqbal* majority made clear: "Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike." 129 S. Ct. at 1953 (citation omitted).

[8] Since *Twombly* and *Iqbal*, the highest courts in Massachasutts and Nebraska, and a lower court in Delaware, have adopted the plausibility standard under their own pleading requirements. *See, e.g.*, Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008); Doe v. Board of Regents of the University of Nebraska, 280 Neb. 492 (2010); Estate of Williams v. Corr. Med. Serv., Inc., 2010 WL 2991589 at *14, n.3 (Del. Super. Ct., 2010). At the same time, courts in several states have explicitly rejected a plausibility standard. *See, e.g.*, Webb v. Nashville Area Habitat for Humanity Inc., 2011 Tenn. Lexis 623 (2011)(Tennessee); McCurry v. Chevy Chase Bank, 169 Wash.2d 96 (Wash. 2010)(Washington); McKelvin v. Smith, 2010 WL 5030130 (Ala. Civ. App. 2010)(Alabama). Interestingly, at least on Ohio court has sound that both the Conley "no set of facts" standard still applies, but that the plaintiff must still allege facts that are plausible. See, Williams v. Con Edison, 2009 Ohio App. LEXIS 4786, at *14-15 (Ohio Ct. App. 2009). For a discussion of the application of the plausibility standard in state court proceedings, see Roger Michael Michalski, *Tremors of Things To Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 110 (2010).

[9] See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 56 AM. U. L. REV. 553 (2010); JOE S. CECIL, *ET AL*, MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL, REPORT TO

results: with some showing a rise in dismissals in all civil filings after the decision in *Twombly*, especially in civil rights cases, while internal research conducted by the courts does not appear to support such findings across the board.[10] That being said, this prior research may have had some shortcomings, and this study attempts to fill the gaps left by this previous body of work.

The goal of this study is to assess whether *Twombly's* plausibility standard has begun to impose a higher bar on certain civil rights plaintiffs. The fear is that the plausibility standard leaves judges with too much discretion, discretion that may harm those plaintiffs who may have difficulty alleging facts to overcome a particular judge's subjective skepticism of civil rights claims. This fear was expressed by many observers (including this author),[11] in *amicus* briefs filed in *Iqba*l,[12] and through scholarly

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THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (March 2011)(hereinafter the "Cecil Report").

[10] See, e.g., Kendall W. Hannon, *Note: Much Ado About Twombly? A Study of the Impact of Bell Atlantic v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1838 (2008) (showing that, in the four months following the Court's decision in *Twombly*, there was a 39.6% greater chance that a civil rights case would be dismissed when compared to all other cases analyzed). A recent study compiled for the federal Judicial Conference Advisory Committee on Civil Rules, discussed in greater detail at the text accompanying notes 79 through 84, *infra*, found there to have been little change in dismissal rates without leave to amend when comparing results in two samples of decisions, one sample taken from before the Supreme Court's decision in *Twombly* and another after its decision in *Iqbal.* In one area, however, described as dealing with "financial instruments," the dismissal rates were markedly higher after *Iqbal.* See, Cecil Report, *supra* note 12.

[11] In the interest of full disclosure, this author participated in the litigation that ultimately came to be known as *Ashcroft v. Iqbal* since before the matter was even filed in federal court. Prior to joining the faculty at Albany Law School, I was a supervising attorney at the Urban Justice Center (UJC) in New York City, the non-profit legal services office that was Mr. Iqbal's initial counsel in the case. I then supervised the staff who handled the matter from its inception, including Megan Lewis, Andrew Kashyap and Haeyoung Yoon, who all handled different aspects of the case while UJC was co-counsel on the matter. I do not wish to overstate my role, however. My staff followed the lead of lead counsel in the case, the firm of Koob & Magoolaghan, and, later, pro bono co-counsel from the firm of Weil Gotshal & Manges. As a result of these co-counsel arrangements, my personal involvement was limited. After leaving the UJC, I then teamed up with John E. Higgins, Esq., of Nixon Peabody, LLP, and law students Umair Khan and Robert Magee, in drafting an amicus brief filed with the Supreme Court in support of Mr. Iqbal.

[12] A large number of civil rights and other groups and individuals filed amicus briefs on behalf of Respondents. See, e.g., Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 U.S. S. Ct. Briefs Lexis 884; Brief of National Civil Rights Organizations as Amici Curiae in Support of Respondents, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 U.S. S. Ct. Briefs Lexis 896; Brief of Amici Curiae, The Japanese American Citizens League et al. In Support of Respondent , Ashcroft v. Iqbal, 129 S. Ct.

treatments of the plausibility standard.[13] Given the nature of the standard, a fear is that with such a blunt instrument, judges will have broad discretion to apply the standard to weed out otherwise meritorious cases, simply because such cases do not seem to mesh with a particular judge's "experience" and his or her "common sense."

Research into the first of these questions—whether the Court's decisions in *Twombly* and *Iqbal* will have a chilling effect on civil rights litigants—has generated some results, most of which show a relatively slight increase in the percentage of motions to dismiss granted in reported civil rights cases following these decisions. An initial issue that arises, that raises questions about these previous studies, is that this body of research has typically involved analysis of outcomes in cases that go beyond the key question in *Twombly* and *Iqbal:* i.e., that key issue being, of course, whether pleadings provide sufficient detail to raise a plausible claim for relief. Furthermore, a second, related question goes to the fact that little has been done to assess the *quality* of the decisions in the following way: reviewing the manner in which the so-called plausibility standard is being applied, if at all, by the district courts when dismissing claims.

This Article attempts to step into these apparent gaps in the empirical research, first by ensuring that the analysis reviews only cases in which the sufficiency of the pleadings were tested. Prior studies have reviewed outcomes in all motions to dismiss, including those filed on grounds not related to the specificity of the pleadings: e.g., where a statute of limitations defense was raised, or the defendant alleged the plaintiff had not exhausted his or her administrative remedies. Since such defenses were viable before *Twombly* and *Iqbal*, and are not related to the plausibility or specificity of the allegations in the pleadings *per se*, the *Twombly* and *Iqbal* precedents bear no relation to the merits of such motions and should have no impact on their outcome. In order to narrow the focus of any Twombly/Iqbal inquiry, this study focuses only on outcomes in decisions where defendants challenged the specificity of the pleadings through a motion to dismiss or motion for judgment on the pleadings.

Other innovations of this study include the following: it focuses explicitly on two classes of cases: civil rights actions involving allegations of employment and/or housing discrimination; it looks at the *quality* of the decisions by assessing how lower courts are deploying the plausibility standard; it reviews

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1937 (2009) (No. 07-1015), 2008 U.S. S. Ct. Briefs Lexis 893(co-authored by this author).

[13] For an overview of some of the critiques of these opinions, see *infra* text accompanying notes 86 through 89.

the extent to which judges appear to be applying their "experience and common sense" to solve pleading challenges before them, as urged by the Court; finally, it has more of a body of post-*Iqbal* cases to review than previous studies.

In summary, this analysis yielded a few key findings from the cases studied. First, it seems that the Supreme Court's decision in *Twombly* itself had little impact on motions challenging the sufficiency of the pleadings in the employment and housing discrimination cases analyzed for this study. The study shows that the dismissal rate of in the cases reviewed during a set time-period immediately prior to that decision was actually higher than the dismissal rate of decisions reviewed in the time period between issuance of the *Twombly* and *Iqbal* decisions. Then the dismissal rates in the cases reviewed actually increased considerably after *Iqbal*, however. Indeed, the dismissal rates for the pre-*Twombly* cases in the data base used in this study was 61%; for those issued between *Twombly* and *Iqbal* and analyzed here, it was 56%; but then for those issued after *Iqbal* and which became a part of this study, it was 72%. As more fully described below, one can explain the drop in the dismissal rate between *Twombly* and *Iqbal* by pointing to the success of litigants pursuing disparate impact cases, particularly those pursuing challenges to reverse redlining practices of mortgage lenders during the height of the subprime mortgage crisis.

In addition, even more troubling than the dismissal rate is the fact that the plaintiffs in the employment and housing cases studied were far more likely after *Iqbal* than before *Twombly* to face a motion to dismiss challenging the specificity of the pleadings. Indeed, among the cases analyzed, decisions on such motions were generated only 12 times in the first quarter of 2004 (the first quarter analyzed), but then 61 times in the third quarter of 2010 (the last full quarter analyzed): a 500% increase.

When comparing *Twombly* and *Iqbal*, then, it would appear that it is the latter case that has had a much greater and adverse impact on these types of civil rights cases than the former, at least within the universe of cases analyzed in this study

When it comes to the quality of these decisions, something else appears to be happening. Despite the increased dismissal rate following *Iqbal*, oddly, in a class of cases analyzed for this study,[14] courts rarely invoked the plausibility standard in the same manner

[14] When looking at the use of the plausibility standard, the study reviewed the largest class of cases identified in the data base: i.e., non-disparate impact cases in which the motion was granted and all claims dismissed. This subset was made up of 99 cases: roughly 16% of all cases analyzed in this study. Furthermore, it is safe to assume that this is the type of case in which the plausibility standard was most likely to be invoked to dismiss a case.

it was utilized by the Supreme Court in *Twombly* and *Iqbal*; that is, courts rarely found that a case should be dismissed because a judge considered there to be a more plausible, and entirely legal, basis for the complained of conduct. Thus, the Court's approach to assessing plausibility, as utilized in both *Twombly* and *Iqbal*, is one that is rarely used by district courts when dismissing cases for pleading inadequacies. Finally, and similarly, judges rarely, if ever, appear to invoke their own "experience and common sense," as urged to by the Court, when ruling on motions to dismiss in these cases.

These outcomes yield three conclusions. First, during the period of time studied, and in the cases evaluated, district courts used the *Iqbal* precedent, though not necessarily *Twombly*, to dismiss employment and housing discrimination at an accelerated rate compared to the time frame immediately preceding the Court's decision in *Twombly*. Second, although courts invoked the *Twombly/Iqbal* plausibility standard in assessing the sufficiency of the pleadings in employment and housing discrimination cases, they certainly did not rely on the text of those opinions nor did they utilize the plausibility standard as articulated in these opinions. Finally, regardless of whether there is a dramatic *Twombly* or *Iqbal* effect on outcomes, motions to dismiss challenging the sufficiency of the pleadings were much more common after *Twombly*, and even more so after *Iqbal*.

While this study did introduce some innovations to the methodology utilized here, it also has its limitations. First, the data base utilized was made up of only decisions published in electronic form. It does not include all decisions in all district courts during the time period specified. Some argue that decisions on motions to dismiss in which the motion is granted are more likely to be reported than those in which the motion is denied. While this may be the case, this study uses published decisions in all three time-periods studied. There is nothing to indicate that if such a bias exists, it is more likely to exist in one time period than another. Admittedly, the outcomes in this study are a reflection of the data used. No broader claim is made about outcomes in all civil rights cases, or even all employment and housing discrimination cases.

Moreover, some sampling was done to identify a universe of cases to analyze, as more fully described below.[15] While certain qualifiers were used to narrow this universe, and the exact same search terms were not used in each search that was conducted to compile the data base, the study utilized a large sample size, well over 500 cases. While there may have been some limitations to the methodology used, there is no claim here that the outcomes generated by this study are a reflection of all outcomes in all civil

[15] See *infra* notes 101 through 108 and accompanying text.

rights cases litigated in all federal courts from 2004 through 2010. Rather, my goals here are quite modest: to attempt to identify potential trends from a relatively narrow class of cases.

This article proceeds as follows. Part I provides a brief overview of the history of pleading requirements in federal and state courts, leading up to the adoption of the Federal Rules of Civil Procedure. This Part then reviews the Supreme Court's decisions in *Conley v. Gibson,*[16] *Bell Atlantic v. Twombly*[17] and *Ashcroft v. Iqbal,*[18] placing a special emphasis on the development of the *Iqbal* case, from the trial court, through to the decisions of the Second Circuit Court of Appeals and, ultimately, the Supreme Court. Part II contains the results of the empirical analysis conducted for this study.

I. Pleading Requirements, Then and Now.

A. Pre-FRCP History, Rule 8(a) and Conley v. Gibson.

With the adoption of the new Federal Rules of Civil Procedure in 1938, the drafters intended to eliminate the costly and burdensome "fact pleading" system then in place, choosing, instead, a "notice pleading" approach. Under fact pleading, popular after the adoption of the Field Code in New York,[19] litigants could dismiss their opponents' claims or defenses for improper reference to "mere evidence" or "conclusions," which were prohibited, as opposed to "ultimate facts," which were required.[20] Divining the difference between these categories of facts proved challenging at best.[21] Over 50 years ago, then-Professor Jack Weinstein, commenting on these requirements, argued as follows:

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[16] 355 U.S. 41 (1957).
[17] 550 U.S. 544 (2007).
[18] 129 S. Ct. 1937 (2009).
[19] On the popularity of the Field Code, see JACK J. COUND, JACK H. FRIEDENTHAL AND ARTHUR R. MILLER, CIVIL PROCUDURE: CASES AND MATERIALS 372 (3rd Ed. 1980)(describing the Field code as the "prototype" for many states' rules and the "precursor" to the Federal Rules of Civil Procedure).
[20] As pointed out by Richard Marcus, "Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'" See, Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986). In this 1986 work, Professor Marcus presciently wrote about his concern that the courts were returning to fact pleading, as opposed to notice pleading, a concern made only more grave after the decisions in *Twombly* and *Iqbal*. *Id.*
[21] One commentator described this tension as follows:

> [T]here is no logical distinction between statements which are grouped by the courts under the phrases "statements of fact" and "conclusions of law". It will also be found that many, although by no means all, pleadings held bad because they are said to plead "evidence" rather than the "facts constituting the

> It is now generally conceded that it is virtually impossible logically to distinguish among "ultimate facts," "evidence," and "conclusions." Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described.[22]

The FRCP was supposed to have been an improvement to the Field Code, under which litigants were to draw these distinctions in their pleadings.[23] Interestingly, that Code itself had

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> cause of action" or defense really do nevertheless "state" the operative facts which the pleader will have to prove at the trial, but in a form different from that to which courts and lawyers are accustomed to recognize as a proper method of pleading.

Walter W. Cook, *Statement of Facts in Pleading Under the Codes*, 21 Colum. L. Rev. 416, 417 (1921)(citation omitted).

See, also, Riley v. Inter-State Business Men's Accident Association, where the court held as follows:

> Our system of pleading is a fact system, and requires the parties to state truly and frankly the facts upon which they rely for their action or defense. It does not allow, on the one hand, the statement of legal conclusions, nor, on the other hand, the statement of evidence of facts. The pleading should state ultimate facts**,** and not the evidence of such facts. This makes the rule on what demurrer admits somewhat difficult of application. The demurrer will not admit a pure conclusion, and the pleader may not plead his evidence. All that the demurrer can ever admit, then, is something which states ultimate facts, as distinguished either from legal conclusions or a setting out of the evidence to prove them.

177 Iowa 449, at 456 (1916 (citations omitted).

[22] Jack B. Weinstein and Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520-521 (1957).

[23] On the history of the Field Code and the adoption of the FRCP to respond to the perceived shortcomings of it, see Matthew A. Josephson, *Some Things Are Better Left Unsaid: Pleading Practice After* Bell Atlantic v. Twombly, 42 GA. L. REV. 867, 874-877 (2008). For a history of the adoption of the FRCP, see Thomas E. Baker, *Federal Court Practice and Procedure: A Third Branch Bibliography*, 30 TEX. TECH. L. REV. 909, 1032-40 (1999).

been instituted to simplify the byzantine common law pleading requirements then in force.[24]

A significant innovation in pleading, Rule 8(a) of the FRCP requires nothing more than the following:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.[25]

Roughly 15 years after adoption of the Federal Rules, the Supreme Court interpreted the meaning of this language. In *Conley v. Gibson*, the Court surveyed the pleadings in a civil rights action and found them adequate. The standard the Court used in assessing the sufficiency of the pleadings was impressive in its generosity; the Court found that a complaint should not be dismissed for failure to state a claim under Rule 12(b)(6) unless it was essentially clear that a plaintiff could never establish any grounds for relief:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

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[24] American pleading practice, though somewhat tailored to meet the needs of litigants in U.S. courts, was largely adopted from British common law pleading requirements. Friedman described those as follows:

> Pleading was an elaborate contest of lawyerly arts, and winning a case did not always depend on substantive merits. There were too many rules, and they were too tricky and inconsistent. The idea behind English pleading was not itself absurd. Pleading was supposed to distill, out of the amorphousness of fact and fancy, one precious, narrow issue on which trial could be joined. Principles of pleading were, in theory, principles of economy and order. Pleading demanded great technical skill. Those who had the skill—highly trained lawyers and judges—saw no reason to abandon the system.

Friedman, *supra* note 4, at 145.

[25] FRCP 8(a)(2010).

> prove no set of facts in support of his claim which would entitle him to relief.[26]

Justice Black, writing for the majority, went on to state as follows:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.[27]

Until 2007, when the Court issued its decision in *Bell Atlantic v. Twombly*, the Court re-affirmed this liberal approach to civil pleadings in federal court, at one point calling "axiomatic" that the "no set of facts" language represented the proper standard to apply when assessing the sufficiency of civil pleadings.[28] With *Twombly*, however, a majority of the Justices explicitly disavowed the "no set of facts" standard. It is to the *Twombly* decision that I now turn.

B. Bell Atlantic v. Twombly.

The plaintiffs in *Twombly* alleged that the defendant's "parallel conduct"– such as having similar pricing schemes–of the defendants gave rise to anti-trust claims.[29] The plaintiffs' position was basically *res ipsa loquitor*: according to the plaintiffs, the facts describing such parallel conduct meant that the defendants had to have conspired to act in concert explicitly. Since they had, according to the plaintiffs they were guilty of anti-trust violations.[30]

The Court found that such allegations were insufficient to satisfy FRCP 8(a)'s requirement that the complaint contain a

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[26] 355 U.S. at 45-46.
[27] 355 U.S. at 47 (citing FED. R. CIV. P. 8(a) (2)).
[28] See, e.g., McLain v. Real Estate Board, 444 U.S. 232, 246 (1980)("'It is axiomatic that a complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'")(citing *Conley*). *McLain* was an 8-0 decision, with Justice Marshall taking no part in the decision. See, also, Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 (1976)(quoting Conley's "no set of facts" language with approval). *Hospital Building* was a unanimous decision. Interestingly, both were anti-trust cases.
[29] 550 U.S. at 548.
[30] 550 U.S. at 551.

"short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court found that where, as here, there were equally likely causes for the complained of conduct, it was no more plausible that illegal conduct brought about the factual situation than it was plausible that completely innocent conduct may have also been the source of those facts. The Court went on to conclude as follows:

> The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief."…An allegation of parallel conduct is thus much like a naked assertion of conspiracy in [an anti-trust] complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief."[31]

Beyond just finding a new "plausibility standard" within Rule 8(a),[32] the Court went even farther, disavowing *Conley v. Gibson's* "no set of facts" standard and finding that that "famous observation has earned its retirement".[33] Elaborating, the Court observed that the *Conley* standard was "best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."

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[31] 550 U.S. at 557 (citations omitted).

[32] The appellate court below had found that the plaintiffs' claims were plausible, but did not use this language to articulate a pleading standard. The Court then cited a district court opinion of Court of Appeals Judge Richard Posner, sitting by designation, in which Posner found that the allegations in a complaint in an antitrust patent case had to be plausible to allow the litigation to enter costly discovery. Asahi Glass Co. v. Pentech Pharmaceuticals, Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003). Even in light of these two lower court precedents, the plausibility standard had not entered into prior opinions of the Supreme Court on the sufficiency of the pleadings. Rather, the Supreme Court did use the term plausibility in determining the sufficiency of allegations, but in the context of reviewing a decision on a motion for summary judgment, which, of course, involves a very different standard. See, Matsushita Electric Indus. Co., Ltd v. Zenith Radio Corp, 475 U.S. 574, 596-97 (1986)("[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e).").

[33] 550 U.S. at 563.

Applying the plausibility standard, the Court ultimately found that "[b]ecause the plaintiffs failed to nudge[] their claims across the line from conceivable to plausible," the complaint had to be dismissed.[34]

The Court's decision left lower courts and litigants scrambling to discern its meaning and apply its terms. Indeed, courts across the country varied in their interpretation of *Twombly*,[35] with some considering its holding limited to pleading requirements in anti-trust cases, and others applying it to all civil matters regardless of the subject matter.[36]

Enter the plaintiffs in *Iqbal*, who would offer the Court an opportunity to answer some of the questions left unanswered by the *Twombly* opinion.

C. Ashcroft v. Iqbal.

1. Complaint and District Court.

As part of the global law enforcement effort that followed the events of September 11th, U.S. law enforcement and immigration officials detained thousands of men of Arab descent found within the United States.[37] In November 2001, Javaid Iqbal, a man born in Pakistan but residing in the United States lawfully, was arrested by immigration and FBI officials. He was charged with conspiracy to defraud the United States and for possessing fraudulent identification. Iqbal was detained at the Metropolitan Detention Center (MDC) in Brooklyn, NY, and held in the maximum security "Special Housing Unit" within the MDC (known by its acronym, the "ADMAX SHU").[38] Iqbal alleged that prison guards verbally and physically abused him and denied him medical care.[39] After pleading guilty to the charges filed against

[34] 550 U.S. at 570.

[35] See, e.g., United States v. Harcher, 2007 U.S. Dist. Lexis 47028 at *4 (N.D. Ohio June 28, 2007) (holding Twombly "merely held that a complaint that alleged only parallel conduct did not state a claim for an antitrust conspiracy.")). For a discussion of interpretations of the substantive reach of *Twombly's* holding pre-*Iqbal*, *see* Gregory Grattan, The Gatekeepers Keep Changing the Locks: *Swanson v. Citibank* and the Key to Stating a Plausible Claim in the Seventh Circuit Following *Twombly* and *Iqbal*, 6 SEVENTH CIR. REV. 1, 12 (2010).

[36] Comment, Bell Atlantic v. Twombly, Has the Court Re-Set the Bar with a Heightened Pleading Standard, 32 Am J. Trial Advoc. 183, 201 (2008) (arguing "the mammoth weight of the case law suggests that *Bell Atlantic* has unquestionably outstripped its initial contextual boundaries.")

[37] Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at 2 (E.D.N.Y. Sept. 27, 2005).

[38] Complaint, at 15.

[39] Complaint, at 15.

him, though none had anything to do with terrorism, he was ultimately deported to Pakistan in January of 2003.[40]

In September 2004, Iqbal and another individual exposed to the same treatment, Ehab El Maghraby, filed suit in federal district court for the Eastern District of New York, alleging a range of constitutional and statutory violations of their rights. The defendants in the action included various prison guards;the warden at MDC; and, among others, Attorney General Ashcroft and FBI Director Mueller.[41] The complaint alleged that anyone among those detainees swept up in the September 11th investigation would be classified as "of interest" to that investigation, even if they faced no terrorism-related charges. The complaint further alleged that Ashcroft and Mueller approved "the policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI." Ashcroft, it was further alleged, was the "principal architect"[42] of the policy, and Mueller was "instrumental in the adoption, promulgation, and implementation" of it.[43]

With respect to the harsh conditions of confinement, it was alleged that these two defendants "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin."[44]

After Ashcroft and Mueller filed motions to dismiss pursuant to Rule 12 of the FRCP for the alleged failure to state a claim, the trial court ruled against these defendants, deploying the "no set of facts" language from *Conley v. Gibson.*[45]

2. Court of Appeals.

After Judge Gleeson denied most of the bases for the Iqbal defendants' motions to dismiss, the matter was appealed to the Second Circuit. The Supreme Court had already granted certiorariin *Bell Atlantic v. Twombly*, but the decision was not issued in that case until after oral argument before the Second Circuit. he Second Circuit issued its decision reversing in part Judge Gleeson's prior decision, but affirming those aspects of it

[40] Iqbal v. Hasty, 490 F.3d 143, 149 (2nd Cir. 2007).
[41] Complaint at 3-5.
[42] Complaint at 4.
[43] Complaint at 4-5.
[44] Complaint at 17-18. See also, Ashcroft v. Iqbal, 129 S.Ct. 1937, 1944 (2009)(recounting allegations in the complaint).
[45] See Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at 29 (E.D.N.Y. Sept. 27, 2005).

related to the sufficiency of the allegations related to Ashcroft and Mueller's involvement in setting the challenged policies.[46]

Applying *Twombly's* plausibility standard to the allegations of the complaint, the Second Circuit turned first to the plaintiff's procedural due process claim. Considering the language in the complaint, i.e., that Ashcroft and Mueller had "condoned" the challenged policy, the court looked to the context of the suit to assess the plausibility of the allegations. Because of the high priority given the law enforcement effort in the wake of the attacks of September 11, the court found it plausible that both Ashcroft and Mueller did indeed condone the challenged policy.[47] Despite the finding that these allegations were plausible given the context, the court ultimately found that because the right purportedly violated was not a clearly established right at the time of such violation the procedural due process claim could not survive the defendants' qualified immunity defense, warranting dismissal.[48]

Turning to claims of discrimination, Ashcroft and Mueller challenged the specificity and the plausibility of Iqbal's claims that they had knowledge of and condoned the allegedly discriminatory treatment of the plaintiff. Looking once again to post-9/11 context in which the claim arose, the Second Circuit found it plausible that the Attorney General and Director of the FBI were aware of and condoned the discriminatory practices to which Iqbal alleged he was subject.[49]

Ultimately, the Second Circuit found that these allegations were sufficient to satisfy even the strictures of the new plausibility standard articulated in *Twombly*.[50]

3. Supreme Court.

Ashcroft and Mueller then sought review of the appellate decision by writ of certiorari to the Supreme Court. Review was granted by the high court,[51] which heard oral argument on the matter in early December, 2008.

a. Oral Argument: The Elusiveness of the Plausibility Standard.

[46] As the Second Circuit opinion pointed out, plaintiff Iqbal was of Pakistani, and thus, not Arab, descent. Regardless, as the appellate court found, he was singled out for treatment based on his ethnicity, if not his perceived race. 490 F.3d at 148, n. 2.
[47] 490 F.3d at 166.
[48] 490 F.3d 167-168.
[49] 490 F.3d at 175-176.
[50] 490 F.3d at 178.
[51] Ashcroft v. Iqbal, 554 U.S. 902, 128 S. Ct. 2931, 171 L. Ed. 2d 863 (2008).

Solicitor General Gregory Garre, arguing for the petitioners, stated that the first error of the appellate court below was that it "conclud[ed] that the complaint stated a violation of clearly established rights by the former Attorney General and Director of the FBI."[52] By framing the argument in this way, just as the petitioners had done in their briefs,[53] Garre had staked the position that in a case where a defendant may invoke a defense of qualified immunity, a plaintiff must plead certain specific facts in the complaint that would permit that plaintiff to overcome such a defense: including, that the defendant had violated clearly established rights. Several of the justices questioned whether such a position was correct: i.e., that a plaintiff must anticipate potential defenses that a defendant might not even raise, when such an issue is best left to the summary judgment phase of the proceeding, if at all.[54]

As to plausibility, Justice Souter, the author of the *Twombly* opinion, stated that in that prior case, there was no evidence that might suggest that illegal conduct was a more likely explanation for the allegations of parallel conduct in that antitrust case.[55] The bulk of the Justice's questioning surrounding the plausibility of plaintiff's claims was then left mostly to plaintiff's counsel.

Following Garre's argument, Alex Reinert took the podium on behalf of Iqbal. The discussions between Reinert and the Justices, and even, apparently, between the Justices themselves, reveal that the plausibility standard appears elusive, even to the Court. Reinert initially faced a series of questions from Justice Scalia regarding the plausibility of the allegations in the complaint.

> Justice Scalia, relying on the Court's application of the plausibility standard in *Twombly*, asserted that in the instant situation it was "much less plausible" that higher level officials had knowledge of the conduct alleged than they had. .[56]

After some back-and-forth between the Justices and Reinert, Justice Souter stepped in with what he admitted may have been a "softball"[57] question. Building on earlier questioning from

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[52] Transcript at 3-4.
[53] Ashcroft v. Iqbal, 554 U.S. 902, 128 S. Ct. 2931, 171 L. Ed. 2d 863 (2008).
[53] See, Brief for Petitioners, Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (U.S. 2009) (No. 07-1015), 2008 U.S. S. Ct. Briefs Lexis 740; Reply Brief for Petitioners, Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (U.S. 2009) (No. 07-1015), 2008 U.S. S. Ct. Briefs Lexis 1104.
[54] See, e.g., Transcript at 4 (question by Justice Ginsburg); Transcript at 9 (question by Justice Souter).
[55] Transcript at 10.
[56] Transcript at 33.
[57] Transcript at 40.

Justice Breyer, in which it was asked whether a complaint would seem plausible if a plaintiff alleged that the president of a beverage company was responsible if a consumer found a mouse in a bottle, Justice Souter stated that he was "starting with the assumption" that in Twombly "the context tells us how specific" a complaint has to be. He then asked if the complaint in Iqbal was based on the assumption that :"it is more plausible that the Attorney General of the United States and the Director of the FBI were in fact directly involved in devising a policy with the racial characteristics and the coercive characteristics that you claim, than that the President of Coca Cola was putting mouses (sic) in bottles?"[58]

In a moment of candor, Chief Justice Roberts, perhaps revealing the true problem with the plausibility standard, then followed up on Justice Souter's question, again, comparing the allegations against a president of a company as opposed to allegations made about the actions of the Attorney General: "how are we supposed to judge whether we think it's more unlikely that the president of Coca-Cola would take certain actions as opposed to the Attorney General of the United States?"[59]

After some exchanges between the Justices and Reinert, Justice Scalia asked whether the plaintiff's allegation that he had been held without any legitimate penological reason was sufficient to create a plausible claim for relief. This led to this exchange, which is recounted at length:

> JUSTICE SCALIA: I mean, is that the only basis -- after an attack on the country of the magnitude of 9/11, is that the only basis on which people could be held? Namely that these people are the -- are the guilty culprits, and we are going to put them in jail?
> MR. REINERT: Well --
> JUSTICE SCALIA: Surely for at least a period, you can hold people just -- just to investigate?
> MR. REINERT: Well, Justice Scalia, I don't think for a period it's constitutional to hold them solely based on their race, religion, and national origin. And if it is --
> JUSTICE SCALIA: Well, it wasn't solely on that.
> MR. REINERT: Well, that is the allegation. If it is, that's an issue to be dealt on the merits, exactly as this Court did in Johnson v. California.

[58] Transcript at 40-41.

[59] Transcript at 41-42. As Justice Stevens pointed out, the allegations that Coca Cola was responsible for having mice in its product was purely hypothetical, and no one was suggesting that such was the case. Transcript at 43.

> JUSTICE SCALIA: But the net was surely not cast wide enough if anybody with that race, religion was -- was swept in.
> MR. REINERT: Well --
> JUSTICE SCALIA: I mean, if it's solely for that reason, there would have been hundreds of thousands of others.
> MR. REINERT: Justice Scalia, that is the allegation in the complaint, that as individuals were encountered --
> JUSTICE SCALIA: -- implausible.[60]

This exchange and the previous ones described above would appear to expose some of the tensions and shortcomings associated with the plausibility standard, both generally, and specifically in this case. First, Chief Justice Roberts seems to ponder whether the plausibility standard is something a judge can even apply. Second, and more revealing, Justice Scalia simply did not think it plausible that the defendants were responsible for the treatment of the plaintiff because, apparently, "hundreds of thousands" of other individuals would have been treated the same way as plaintiff if something truly had been awry. At the same time, remember, it was the appellate panel below that considered the plausibility of the plaintiff's allegations, and found that they satisfied that test. That court found the allegations plausible, with no greater amplification, "because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11."[61] More on this second point shortly.

Ultimately, the Court's issuance of its slim, 5-4 ruling rejecting Iqbal's claims provided an opportunity for the majority to amplify its own thoughts on the plausibility standard, and it is to that opinion that I now turn.

b. Decision

In May of 2009, two years after *Twombly*, the Court issued its decision in *Ashcroft v. Iqbal*, with Justice Kennedy writing for the majority and with that majority siding with the former Attorney General and the FBI Director. After dealing with some issues related to its jurisdiction, articulated two "working principles" that "underlie" the decision in *Twombly*. First, a court need not accept

[60] Transcript at 55-56.
[61] 490 F.3d at 175-176.

"[t]hreadbare recitals of the elements of a cause of action"[62] as true for the purposes of assessing the sufficiency of the pleadings. The second working principle was the following:

> [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its *judicial experience and common sense*. But where the well pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief."[63]

After reviewing the allegations of the complaint through these working principles, the majority found the complaint wanting. First, the Court analyzed those allegations against Ashcroft and Mueller that claimed that the two had condoned harsh conditions of confinement of the plaintiff on invidious grounds. The Court found that these allegations conclusory, and thus accepted as true under the first working principle.[64] The "bare

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[62] 129 S.Ct at 1449.

[63] 129 S.Ct at 1949-1950 (citations omitted and emphasis supplied).

[64] This discussion of "conclusory" allegations in *Iqbal* is quite odd, given the discussion of the pleading "paradigm" articulated in *Twombly* itself. The Court there specifically endorsed what would appear to be the very definition of conclusory allegations, as found in the sample pleadings accompanying the Federal Rules themselves:

> The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence. As relevant, the Form 9 complaint states only: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." The complaint then describes the plaintiff's injuries and demands judgment. The asserted ground for relief-namely, the defendant's negligent driving-would have been called a " 'conclusion of law' " under the code pleading of old. But that bare allegation suffices under a system that "restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial."
>
> *Twombly* 575-576 (Citations omitted).

The phrase "negligently drove" a car is recognized—indeed, is held up—as an example of an allegation that provides detail sufficient to satisfy Rule 8(a). It is

assertions" of involvement by Ashcroft and Mueller in condoning these practices "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy ''because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'"[65]

The Court then went on to review the allegations that the policy of "hold until cleared" fell along racial lines against the plausibility standard. There, the Court found the allegations were similarly wanting.

> Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But *given more likely explanations*, they do not plausibly establish this purpose.[66]

The Majority went on to review the allegations that the plaintiffs have been targeted based on their race, religion and national origin in detail as follows, measuring them against the plausibility standard and finding them implausible because there were other, alternative explanations for the conduct that were not illegal:

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim- Osama bin Laden-and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.

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hard to imagine a legal term that is more conclusory or loaded than the word "negligently."

[65] 129 S. Ct at 1951 (citations omitted).

[66] 129 S. Ct at 1951 (citations omitted and emphasis supplied).

> As between that "obvious alternative explanation" for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.[67]
>
> The Majority then went on to discuss those aspects of the plaintiff's allegations related to the "hold until clear" policy and found them similarly implausible. The court found that all such allegations "plausibly suggest[] is the following:[T]hat the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible."[68]

It is important to note at this juncture that the Court did not support the position that the respondent had to have set forth claims sufficient to overcome the petitioners' anticipated immunity defense, as the petitioners had requested. Rather, the majority of the Court simply found that the allegations were implausible, or, rather, not as plausible as other, potential explanations for some of conduct the respondent had experienced while in custody. This question goes to the heart of the petitioner's claims, not the nature of any particular defense. Even if the petitioners in Iqbal had been private actors, without the benefit of a potential immunity defense, it is hard to argue that the Court would have found Iqbal's claims plausible. In other words, and some will disagree, *Iqbal* is not a case about the allegations necessary to overcome the defense of qualified immunity, or any other defense for that matter; rather, it is about the degree of specificity required of plaintiffs in setting forth their affirmative claims, which is wholly unrelated to any particular defense a defendant may or may not raise.

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[67] 129 S. Ct at 1951-1952 (citations omitted). For a critique of the Court's apparent willingness to infer that the Iqbal defendants were acting in good faith in the wake of the 9/11 attacks, see Michael C. Dorf, Iqbal *and Bad Apples*, 14 Lewis & Clark L. Rev. 217, 218 (2010).

[68] 129 S. Ct at 1952 (citations omitted).

In a dissenting opinion written by Justice Souter, the author of the Court's decision in *Twombly,* four Justices[69] dispute the conclusions reached by the majority, specifically with regard to the majority's casting of the allegations regarding Ashcroft and Mueller's condoning of the discriminatory policies as conclusory.

> Twombly does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.[70]

And there it is. Four justices and three appellate judges found the allegations plausible; five justices did not. It is hard to argue that the plausibility standard, as presently articulated by the Court, does not lie in the eyes of the beholder. The elusiveness and subjective nature of the standard thus may lend itself either to misapplication, because judges are unclear as to how to apply it, or even worse, to abuse, with judges using it as license to dispose of cases on their dockets regardless of their merit.

But all of this may be mere speculation. The real question is, in the time since the Court's decision in *Iqbal,* do facts on the ground—namely, the manner in which courts are using this precedent—raise any cause for concern that these pleading standards are having an impact on litigation in the federal system? Moreover, should one be concerned that particular kinds of cases may fare particularly poorly in the wake of this precedent? The remainder of this article is dedicated to addressing these questions, and assessing the impact of the plausibility standard, specifically in employment and housing discrimination cases. It is to this analysis that I now turn.

II. The Impact of the New Pleading Standards on Employment and Housing Discrimination.

In many ways, the decisions in *Twombly* and *Iqbal* are consistent with a general trend, evident in both the courts and legislatures, that has sought to limit access to courts, particularly

[69] Justice Souter's dissent was joined by Justices Stevens, Ginsburg and Breyer. Justice Breyer also wrote a separate dissent.
[70] 129 S. Ct at 1959 (Souter. J., dissenting)(citations omitted).

federal courts, to resolve grievances.[71] Where the decades following the amendment to the federal rules saw the court house doors opened to litigants pressing civil rights claims, protecting consumers, and reining in government overreach and abuse, over the last three decades a backlash of sorts has occurred, and courts and legislatures have sought to limit access to the courts through a variety of mechanisms.[72] Courts have utilized a narrow reading of standing requirements to limit access to certain plaintiffs, and have invoked other mechanisms, such as the political question doctrine, abstention and preclusion, to limit the types of cases that can be adjudicated.[73] They have expanded the availability of summary

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[71] See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the 'Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?,* 78 NYU L. REV. 982 (2003)(arguing that limitations on court access undermine core democratic principles); Jeffrey W. Stempel, *Constricting Access to the Courts: Myth or Reality? Boon or Bane?,* 40 ARIZ. L. REV. 965 (1998)(noting constriction of access to federal courts). For an analysis of the ways in which modern pleading rules fall within this trend, see Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009).

[72] As Arthur Miller has recently argued:

> Federal civil procedure has been politicized and subjected to ideological pressures. Thus, the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal* should be seen as the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. It also marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth. To a significant degree, the liberal-procedure ethos of 1938 has given way to a restrictive one.

Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Procedure,* 60 DUKE L. J. 1, 9-10 (2010).

[73] The literature on the political nature of many of these doctrinal matters is extensive, a recounting of which is beyond the scope of this article. With respect to standing doctrine in particular, representative scholarship includes: William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988)(describing the "lawlessness" of many standing decisions); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758 (1999) (describing standing doctrine as "malleable" which permits judges to "further their ideological agenda" through them); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992)(criticizing standing doctrine). For a defense of the use of some of

judgment as a tool for preventing cases from making it to trial.[74] They have narrowed the availability of expert testimony in certain contexts.[75] Furthermore, in the Supreme Court's most recent term, it has scaled back the availability of class action relief in certain types of cases, meaning an end to the costs savings associated with many large class actions they produce for plaintiff-side attorneys, and enforced mandatory arbitration clauses in consumer contracts, making it likely that disputes surrounding many consumer transactions will no longer be resolved in the courts.[76]

But it has not just been the judiciary that has sought to limit the power of courts to adjudicate many types of disputes. Congress has limited access to courts in certain substantive areas of law, like securities cases[77] and prisoner litigation,[78] and has narrowed the availability of class action remedies in certain contexts.[79] As in the securities and class action contexts, in some instances Congress limited access to state courts, while preserving what may have been perceived as the "defense-friendly" and transaction-costs-heavy federal courts for many litigation contexts.[80]

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these doctrines, see Lea Brilmayer, *The Jurisprudence of Article III: Perspective on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

[74] For a description of the ways in which Supreme Court precedent has increased the availability of summary judgment, see Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L. J. 95 (1988).

[75] See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 579 (1993)(establishing standards for admissibility of expert testimony in federal courts).

[76] For a discussion of the key procedural opinions of the Supreme Court's most recent term, see Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 1 (2011)(forthcoming).

[77] See, e.g., the Private Securities Litigation Reform Act of 1995, Pub. L. No 104-67, 109 Stat. 737 (codified as amended in various sections of 15 U.S.C.)(imposing heightened pleading requirements in certain securities cases) and the Securities Litigation Uniform Standards Act of 1998, Pub L. No 105-353, 112 Stat. 3227 (codified as amended at 15 U.S.C. §78a (2006)(limiting state securities litigation).

[78] 42 U.S.C. §1997e. (1996).

[79] See Class Action Fairness Act of 2005, 28 U.S.C. §§1332(d), 1453 (2006)(limiting access to state courts for certain types of class actions). For a description of some of these efforts, see David Marcus, The Past, Present and Future of Trans-Substantivity in Federal Civil Procedure, 59 DePaul L. Rev. 371, 404-409 (2010).

[80] For an argument that CAFA will drive up transactions costs for plaintiff-side attorneys, *See* Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. 437 (2010).

It is within this context that the decisions in *Twombly* and *Iqbal* arise, and the following discussion goes into greater detail about these precedents and their critics.

A. Critiques of *Twombly* and *Iqbal*.

There is a growing body of criticism of the Supreme Court's new civil pleading jurisprudence, from scholars and practitioners alike. Some argue that the plausibility standard worked a change to the Federal Rules of Civil Procedure through the courts, and not, as would have been proper, the legislature;[81] others that the indeterminate nature of the plausibility standard gives district courts little guidance on how to handle motions to dismiss.[82] Some have expressed concerns that such an indeterminate standard grants too much discretion to judges who might harbor hostility to certain types of cases or particular litigants and will use that discretion to reject certain claims.[83]

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[81] See, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA LAW REV. 821, 823 (2010). See also, Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 HAMLINE L. REV. 205, 208 (2010)(arguing that the Court in Twombly and Iqbal created a "heightened pleading standard" inconsistent with the FRCP); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Aschroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010)(arguing that the Court's "thick" screening approach in Iqbal should only be adopted by Congress, not the courts).

[82] As David Noll points out, the Court in Iqbal "leaves a number of questions unanswered." For example:

> What parts of a legal case is the pleader responsible for pleading? How convincing must the showing of "entitlement" to relief be to send a case to discovery? What sort of information may a pleader (and the court) rely on? Until these questions are presented in concrete cases, there is only so much a general statement of a general standard can resolve. The judicial process is such that a single decision--even a landmark decision--cannot begin to resolve all the problems of application that arise under a single, generally applicable standard.

David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L. J. 117, 131 (2010)(footnote omitted). See also, Clermont & Yeazell, *supra* note 84, at 823 (criticizing the plausibility standard as "foggy"). One analysis of cases decided in the decade prior to *Twombly* suggests that the "heft" of an initial pleading in a case bears no relationship to the ultimate outcome. See, Alex A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L. J. 119 (2011). For an attempt to reconcile the standard articulated in the holdings in *Twombly* and *Iqbal* with the purposes of pleading rules and prior precedent, see Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

[83] *See, e.g., Access to Justice Denied: Hearing on Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the*

Others posit that the pleading bar has been raised too high, at too early a phase in litigation, particularly where information about alleged illegal conduct is not generally available to plaintiffs.[84]

H. Comm. on the Judiciary, 111th Cong. 61 (2009) [hereinafter *Access to Justice* Hearing] (statement of John Vail, Senior Litigation Counsel and Vice President, Center for Constitutional Litigation), *available at* http://judiciary.house.gov/hearings/pdf/Vai1091027.pdf (criticizing *Iqbal* for the discretion it confers on judges); *id*. at 79 (statement of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund), *available at* http://judiciary.house.gov/hearings/pdf/Adegbile091027.pdf (criticizing *Iqbal* as likely to have a disparate impact on civil rights litigants). See, also, Hearing on H.R. 4115, the "Open Access to Courts Act of 2009," Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary, 111th Cong. 110, 23 (2009)(statement of Eric Schnapper, Professor, University of Washington School of Law)(expressing concern that *Twombly* and *Iqbal* will have result in judges dismissing otherwise meritorious civil rights claims for technical pleading defects); see, also, Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443 (2010)(arguing subjective aspects of plausibility determination likely to impact adversely claims by members of non-dominant, minority communities).

[84] See, Richard A. Epstein, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL'Y 61, 61 (2007)(while defending the ultimate outcome in *Twombly*, arguing that the plausibility standard is appropriately deployed where information about a defendant's misconduct is publicly available); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010). As Arthur Miller argues:

> In many modern litigation contexts the critical information is in the possession of the defendant and unavailable to the plaintiff. I can understand requiring a plaintiff to plead what he or she knows or should know, but it is rather futile to tell the pleader to plead what is unknown. Discovery was designed to let each side have access to that type of information so that the litigation playing field would be level to promote more informed settlements and trials.

Arthur R. Miller, *Are the Federal Courthouse Doors Closing: What's Happened to the Federal Rules of Civil Procedure?* 43 TEX. TECH. L. REV. 587, 596 (2011). See also, Rakesh N. Kilaru, Note, *The New Rule 12(b)(6)*: Twombly, Iqbal, *and the Paradox of Pleading*, 62 Stan. L. Rev. 905, 926-929 (2010)(noting "paradox" that when information about illegal conduct is not generally available, under *Iqbal*, the plaintiff cannot attempt to file a claim to get access to that information through discovery). See also, Richard A. Epstein, *Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 200-201 (2011)(praising staged and limited discovery as a means of weeding out weaker cases and an alternative to outright dismissal where defendants may possess information relevant to plaintiffs' claims); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Deterimental Effect of* Iqbal *on Civil Rigths Cases*, 14 Lewis & Clark L. Rev. 65 (2010) (arguing that pre-dismissal discovery can offer alternative to outright dismissal for pleading

Still others argue that the new plausibility standard will chill the vindication of important rights and will favor the powerful over the powerless.[85]

A number of legal scholars have conducted empirical studies to determine the impact of the pleading standards of *Twombly* and *Iqbal* in the relative short time-frame since their issuance. One such study, in a random selection of cases filed both before *Twombly* and after, found a slight increase in rates of dismissal on pleading grounds, from 46% to 48%, then a greater increase, to 56%, in cases in which motions to dismiss were ruled upon after *Iqbal*.[86] In addition to identifying these overall dismissal rates, the study went on to break down cases according to case type, as identified by the federal courts' Civil Cover Sheet, including "contracts," "torts," and "civil rights." When broken down by case type, the author found some divergence in the success of motions to dismiss under *Twombly* and *Iqbal* depending on the nature of the case. For example, in "constitutional civil rights cases" the dismissal rate was higher across the board: from 50% dismissal rate in the year preceding *Twombly*, 55% in the time-span between *Twombly* and *Iqbal*, and 60% after *Iqbal*.[87]

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deficiencies in complaints). As Elizabeth Schneider argues, the Court's decisions in Twombly and Iqbal lead to "absurd" results:

> Twombly and Iqbal have effectively commanded district judges to assess pleadings and the credibility of plaintiffs' allegations as though they were summary judgment motions…[As argued elsewhere,] summary judgment decisionmaking has been problematic and controversial. For a district judge to be called on to make a similar assessment on pleading, based on "judicial experience" and "common sense" and before discovery, is absurd.

Elizabeth M. Schneider, *The Changing Face of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*,158 U. PA. L. REV. 517, 536 (2010).

[85] Gary S. Gildin, Iqbal *and Constitutional Torts: The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*,114 PENN ST. L. REV. 1333, 1335 (2010)(arguing that *Iqbal* "is but the latest instance in a long line of cases in which the Supreme Court, acting *sua sponte*, legislates a doctrine freeing government and its officials from accountability for proven violations of the Constitution."); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Procedure*, 60 DUKE L. J. 1, 61-77 (2010)(arguing that procedural limitations such as pleading requirements after *Twombly* and *Iqbal* have privileged concerns about defendant litigation costs and docket control over vindication of rights); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 185 (2010)(arguing that *Iqbal* will make it harder for "out-groups" to challenge "dominant interests").

[86] Hatamyar, *supra* note 12, at 601-602.

[87] Hamanyar, *supra* note 12, at 608.

A more recent study, conducted for the federal Judicial Conference Advisory Committee on Civil Rules, found different results.[88] This study analyzed a sampling of decisions from several district courts found in the federal courts filings database, as opposed to those maintained in electronic databases. Comparing two time-frames—a period of time before *Twombly* and then another after *Iqbal*—the results showed a slight rise in the number of motions to dismiss filed in all types of cases.[89] While this study found an increase in the general dismissal rate from 65% to 77%, this study did *not* find a rise in dismissal rates in most categories of cases where leave to replead was not granted.[90] The one exception was in cases described as concerning "financial instruments," including mortgages.[91] In such cases, there was a

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[88] See, Cecil Report, *supra* note 12. A prior, preliminary study for the Committee on Rules of Practrice and Procedure of the Judicial Conference of the United States found the following:

> The findings show some increase in the rate of motions, and - for most case categories - no more than slight increases in the rate of granting motions. Two case categories that have drawn particular attention are "Civil Rights Employment Cases" and "Civil Rights Other Cases." The monthly average in employment cases for nine months before the *Twombly* decision was 1,147 cases, 527 motions to dismiss (46% of cases), 169 motions granted (15%), and 108 motions denied (9%). For nine months after *Iqbal*, the monthly average was 1,185 cases, 533 motions to dismiss (45%), 185 motions granted (16%), and 80 motions denied (7%). The monthly average in other ci viI rights cases for nine months before *Twombly* was 1,334 cases, 903 motions to dismiss (68% of cases), 264 motions granted (20%), and 158motions denied (12%). For nine months after *Iqbal*, the averages were 1,362 cases, 962 motions to dismiss (68%), 334 motions granted (25%), and 114 motions denied (8%). These figures show a substantial increase in the percent of motions granted. But they cannot show the explanation -whether, for example, the increase is largely in types of pro se cases that survived under notice pleading only because judges felt helpless to dismiss, no matter how manifestly implausible the claim might be.

Memorandum from Hon. Mark R. Kravitz to Hon. Lee H. Rosenthal on the Report of the Civil Rules Advisory Comm. 2-3 (May 17, 2010) *available at* http://ftp.documation.com/references/ABA10a/PDfs/4_1.pdf. That report indicated that a "closer examination of actual cases," id., at 3, and the Cecil Report is the result of that closer examination.

[89] The study excluded prisoner cases and pro se cases.

[90] Cecil Report, *supra* note 12 at 13.

[91] That study used the following definition for financial instrument cases; it combined "nature-of-suit codes indicating case categories for negotiable instruments, foreclosure, truth in lending, consumer credit, and 'other real property.'" Cecil Report., *supra* note 12, at 12.

significant rise in dismissal rates generally, as well as dismissal without leave to replead, after *Iqbal.* In the pre-*Twombly* cases, the general dismissal rate was 47.1% (without leave to replead); after *Iqbal,* a general dismissal rate of 91.9% (without leave to replead).[92]

While the methodology for this study included sampling of cases from select district courts, and did not rely simply on reported decisions in electronic databases,[93] like the other studies conducted before it, it looked simply at success rates for all motions to dismiss, regardless of the basis for the motion, including motions based on exhaustion of administrative remedies, statute of limitations, and other grounds not related directly to the specificity of the pleadings.[94]

The instant study sought to overcome these and other methodological shortcomings. Furthermore, it attempted to narrow the focus of the study, limiting it to employment and housing discrimination cases. The two central questions this article attempts to address are the following. First, has the new pleading standard had an adverse impact on certain types of civil rights cases: here, employment and housing discrimination cases? Second, if the courts are using the precedents in *Twombly* and *Iqbal* to dismiss such cases at a higher rate than before, what aspect of those opinions are courts deploying to do so? It is to these questions that I now turn.

B. Results Overview.

In a nut shell, the study revealed more of an *Iqbal* effect than a *Twombly* effect: that is, there were noticeable changes in the dismissal rates after the issuance of *Iqbal* as opposed to the time period immediately following *Twombly*. In the pre-*Twombly* group of cases, what I refer to as "Group I," 61% of all motions to dismiss were granted, at least in part, and 46% of cases were

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[92] *Id,* at 14, Table 4.

[93] A common criticism of using decisions contained exclusively in electronic data bases is that using such sources is likely to result in an increased number of opinions in which claims were dismissed, because, it is believed, these tend to be overrepresented in such data bases. See, Cecil Report., *supra* note 12, at 2 n. 5 and citations contained therein. Since this study looks at trends over time, using just electronic data bases, any biases of the data would exist throughout the entire time-frame studied for this analysis. I make no claim here that the dismissal rates revealed in the data used in the study are representative of all cases, just of cases contained in these data bases.

[94] For other critiques of the Cecil Report, see Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions,* 45 U. RICHMOND L. REV. ___(2011)(forthcoming); Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss,* U. of Houston Law Center No. 1904134, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904134.

dismissed, at least partially with prejudice.[95] In what I call the Group II decisions (those decided during the time period between the Court's decision in *Twombly* and its decision in *Iqbal*), the dismissal rate for those cases was 56%, but the dismissal rate, at least partially with prejudice, was only 40%. Finally, in the so-called Group III cases, which were decided post-*Iqbal*, the dismissal rate for all cases went up to 72%; with the "with prejudice" rate going up to 51%. Graphic displays of these and other results are set forth in the following section.

As more fully described below, further analysis of these outcomes—for example, by looking at different dismissal rates for cases filed *pro se* as opposed to cases in which the plaintiffs were represented by counsel, by looking at dismissal rates for cases in which disparate impact theories were raised and those in which they were not, etc.—shows the *pro se* litigants generally did not fare as well litigants represented by counsel, and that at least some types of disparate impact claims did better than the cases analyzed as a whole, namely, cases alleging reverse redlining in the subprime mortgage market. Overall, however, there appears to be a clear *Iqbal* effect, and no apparent *Twombly* effect, at least with respect to the universe of cases studied here.

Furthermore, this study included additional analysis to determine the manner in which district courts may be using the plausibility standard, and to what extent courts are relying on judges' "experience and common sense." In reviewing these questions, it seems clear that courts are rarely using the plausibility standard, if they are at all, in the manner in which the Supreme Court did in both *Twombly* and *Iqbal*: that is, where a presiding judge found dismissal appropriate in cases where an arguably more plausible—and entirely legal—explanation existed for the conduct alleged. Moreover, district court judges rarely, if ever, resort to their own experience and common sense, at least not explicitly, when ruling on the sufficiency of the pleadings.

Finally, this study looked at one additional issue: at what rate did plaintiffs face motions to dismiss based on the specificity of the pleadings. Here, since three different time-frames were utilized in developing the data base for this analysis, the study explored the following question: what was the average number of decisions issued per month in which plaintiffs faced a motion to

[95] Cases were categorized as dismissed "with prejudice" when the deciding court explicitly denied leave to replead, found that the matter was dismissed with prejudice, or, simply, if the opinion was silent on whether the plaintiff could replead any claims. According to FRCP 41(b), a dismissal is considered "adjudication on the merits" unless the deciding court explicitly states that the outcome is without prejudice. Categorizing decisions in this way is consistent with the methodology used by the researchers conducting the Federal Courts study referenced above.

dismiss challenging the specificity of the pleadings? This final piece of analysis revealed a disturbing trend: among the universe of cases studied here, plaintiffs are facing a considerably higher number of motions to dismiss in which their pleadings are challenged as lacking specificity; indeed, decisions on such motions were generated at a rate greater than five times the rate pre-*Twombly*.

These and other findings are more fully developed and explained in the following section.

C. Dismissal Rates Analysis.

1. Methodology.

As stated previously, this study attempted to identify employment and housing discrimination cases in which the defendants tested the specificity of the pleadings through either a motion to dismiss for failure to state a claim or for judgment on the pleadings.[96] To identify any potential impact of the *Twombly* or *Iqbal* decisions on the manner in which lower courts treated such motions, this study created a database of trial court decisions from the federal courts during the time period immediately preceding the Court's decision in *Twombly* and the period after. To gauge any greater impact in these classes of civil rights cases after *Iqbal*., the post-*Twombly* decisions were divided into two classes of cases: those cases decided after *Twombly* but before *Iqbal*, and those cases decided after *Iqbal*,.The study identified three different groups of cases, based on the three time-frames laid out above: the 41-month period prior to the Court's decision in *Twombly*; the 24-month period between the Court's decision in *Twombly* and before the *Iqbal* decision; and the 19-month period from the decision in *Iqbal* and when this study was started (mid-May 2009 through mid-December 2010).[97]

The first group of cases was identified using a range of searches on the Lexis database. Initially, the search sought to identify decisions in employment and housing discrimination cases in which the deciding court cited the Court's precedent in *Conley v. Gibson.*[98] In order to ensure that the search terms utilized did

[96] Under federal practice, the same standard applies to 12(b)(6) motions to dismiss as 12(c) motions for judgment on the pleadings, and courts are applying the plausibility test to review pleadings filed under either of these sub-parts of Rule 12.. See, e.g., Conry v. Daugherty 2011 U.S. Dist. Lexis 66658, *9 (E.D. La. 2011).

[97] While there may have been a value to analyzing an identical time-frame before *Twombly* and after, since the analysis was commenced in mid-December 2010, it seemed of greater value to incorporate all decisions then available than to hew to some rigid time-frame.

[98] Using Lexis's combined federal cases database, the search identified decisions in this database issued between January 1, 2004 and May 21, 2007 (the date of

not miss any relevant cases, and to recognize the possibility that courts, pre-*Twombly*, might not have always cited *Conley* in assessing the sufficiency of the pleadings on a motion to dismiss, the study included two additional searches of the 41-month period before the *Twombly* decision. The first sought decisions on motions to dismiss in employment and housing discrimination cases that referenced *Conley's* "no set of facts" language, but did not cite the *Conley* precedent itself.[99] The reasoning behind conducting such a search was that the Court, and lower, appellate courts, had incorporated the "no set of facts" language into subsequent precedents, and district court judges sometimes quoted this language but cited another decision or decisions that had adopted that language. The final search conducted of the pre-*Twombly* time-frame attempted to identify decisions on motions to dismiss in employment or housing cases that cited neither *Conley* nor its "no set of facts" language at all.[100]

The second group of cases was compiled through searches[101] that attempted to identify decisions with the same characteristics as those sought in the first search, but used a different date filter: from May 22, 2007 to May 18, 2009 (the first date being the date of the Court's decision in *Twombly*, and the second, the date of the Court's decision in *Iqbal*). It also added the search term "Twombly" in the search.

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issuance of the Court's decision in *Twombly*). The initial search used the following search terms: "conley /4 gibson & disparate /4 impact or treatment & employment or housing."

[99] The search of Lexis's federal cases combined database was the following, using the pre-*Twombly* date restrictions: "disparate /4 impact or treatment and employment or housing and "no" set of facts and not conley."

[100] That search, once again conducted using Lexis's federal cases combined database, was the following: "motion /4 dismiss /200 disparate /4 impact or treatment & employment or housing and not conley." This search was further refined, using the Lexis "focus" feature to exclude those opinions in which the language "no set of facts" appeared. Again, the pre-*Twombly* date restrictions described above were imposed. The "within 200" modifier was deployed in this and several other searches to winnow down the total number of cases generated using these search terms. The large sample size ultimately identified—well over 1800 cases across all three time periods—likely tempered any distortions in the data that may have been created by using this type of modifier. Moreover, differences across time periods that might have been generated by the use of such a modifier, were similarly balanced out by the use of this modifier across the different time frames with certain supplemental searches.

[101] Again, using Lexis's federal cases combined database, the study ran the following search: "twombly & disparate /4 impact or treatment & employment or housing" within the date range described above.

Finally, the third group of cases was identified through searches using similar terms,[102] but with a date filter of May 19, 2009 through December 19, 2010.

Similarly, in order to ensure that the study did not miss cases in the period post-*Twombly* in which the specificity of the pleadings were challenged but courts did not reference either the *Twombly* or *Iqbal* opinions in reaching their decisions on such motions, additional searches were conducted to identify such cases.[103]

Knowing that the searches conducted would likely yield more decisions than those germane to the study, this author then reviewed the results from these searches to filter out cases outside the scope of the study, and a description of the filtering techniques are described below. Using these techniques, the study winnowed down the cases initially identified using the various searches described above, from the 1852 originally selected, to a total of 634 cases in which the defendants, through motions to dismiss for failure to state a claim and for judgment on the pleadings, challenged the specificity of the allegations of the complaints in employment and housing discrimination cases. After applying the exclusions described below, the search yielded 190 relevant decisions in the first time-frame; in the second, 162; and in the third, 282.

The study deployed a range of techniques to narrow the searches and generate this smaller collection of cases for the data review; such techniques included excluding the following:

- Decisions from appellate courts;

The narrower data set includes only decisions of district judges, and, in some instances, magistrate judges;[104] the set includes no appellate decisions. Furthermore, since this study was

[102] For this third group, the study utilized the following search "twombly or iqbal & disparate /4 impact or treatment & employment or housing" using, once again, the Lexis federal cases combined database.

[103] The study included the following additional search of the post-Twombly/pre-Iqbal time-period: "motion /4 dismiss /200 disparate /4 impact or treatment & employment or housing and not twombly." The study included the following additional search of the post-Iqbal time-period: "motion /4 dismiss /200 disparate /4 impact or treatment & employment or housing and not twombly or iqbal."

[104] In order to prevent double-counting of a single case, if a magistrate's decision was adopted by a district court judge, and that judge cited to either Conley, Twombly or Iqbal, only one of those two opinions were included in the data base. Typically, such district court judge opinions were short on details, and rarely referenced any of these cases in such decisions. In such cases, the magistrate's opinion was included in the data base.

reviewing the conduct of district court judges, whether a particular district court opinion was reviewed on appeal, and reversed or affirmed, was irrelevant to the study.

- Decisions on motions for summary judgment;

Where defendants filed motions to dismiss, or, in the alternative, motions for summary judgment, the analysis took into account only the outcome on the Rule 12 component of those decisions.[105]

- Decisions on motions to dismiss that were not directed to the specificity of the allegations in the pleadings.

Previous studies of the impact of *Twombly* or *Iqbal* included outcomes in all motions to dismiss. Such an approach would, necessarily, include the outcomes in cases having nothing to do with the change in pleading standards brought about by *Twombly* and *Iqbal.* Thus, those studies would include the outcomes in cases that likely would have been the same after *Twombly* as before, since the *Twombly/Iqbal* precedents would bear no relation to the issues before the district courts in such cases. In order to focus on just the impact of *Twombly* and *Iqbal*, this study excluded any decisions in which a defendant challenge whether the plaintiff had properly exhausted his or her administrative remedies prior to filing suit, or filed the suit in an untimely fashion. Similarly, where a defendant sought dismissal based on *res judicata*, collateral estoppel, or complete or partial immunity, and the specificity of the pleadings were not otherwise challenged, such cases were also excluded from the data base. If any aspect of a motion raised any of these issues, yet the specificity of the pleadings were also challenged, the case was included in the data base on the outcome of that portion of the motion that challenged the specificity of the pleadings only. Similarly, if a defendant challenged the specificity of the pleadings with respect to any question related to exhaustion of remedies or the timeliness of the complaint, even though these are both affirmative defenses, decisions on such motions were included in the data base.

- Cases the searches identified that were not related to either employment or housing discrimination.

[105]In contrast, if a moving party sought relief through a motion to dismiss or, alternatively, for summary judgment, if the deciding court considered the motion only as one for summary judgment, that opinion was not included in the data set. Similarly, if a trial judge converted a motion to dismiss into a motion for summary judgment, that decision, too, was excluded from the study.

In some instances, a case involving special education rights under the Individuals with Disabilities Education Act (IDEA)[106] or some other claim under a separate civil rights statute might reference the standards used in employment or housing discrimination cases; in such instances, the search methods utilized generated "false positives." The study excluded such cases from a deeper review. The different kinds of cases that the searches sometimes identified, but were excluded from the study included, as mentioned earlier, special education cases, discrimination in education generally, claims under Title VI of the Civil Rights Act of 1964,[107] cases under the Employee Retirement and Income Security Act (ERISA),[108] and detainee/prisoner litigation challenging conditions of confinement.

At the same time, a wide range of employment and housing discrimination claims were included in the collection of cases analyzed fully for this study: including, Title VII,[109] Title VIII (the Fair Housing Act), the Rehabilitation Act,[110] the Americans with Disabilities Act (ADA),[111] the Age Discrimination in Employment Act (ADEA),[112] the Equal Pay Act,[113] the Family Medical Leave Act,[114] Equal Protection claims implicating employment or housing discrimination[115] and claims under the Fair Housing Act.[116] Additionally, retaliation claims, where viable under any of these other laws or causes of action, were also considered as ripe for deeper study.[117]

The study includes this constellation of laws in order to capture the full range of employment and housing discrimination cases, and because many utilize similar approaches to the types of allegations required of plaintiffs when attempting to establish their prima facie case under such laws: namely, the now-familiar burden-shifting methodology utilized in so many discrimination

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[106] 20 U.S.C. § 1415(i)(2)(A) (2004).
[107] 42 U.S.C. § 2000d(1-101)-(8-101) (2003).
[108] 29 U.S.C. § 1911(a)(1) (2010).
[109] 42 U.S.C. § 2000e-2(a)(1)-(2) (2006).
[110] 29 U.S.C. § 794(a) (2006).
[111] 42 U.S.C. § 12112(a) (2006).
[112] 29 U.S.C. § 621 (2006).
[113] 29 U.S.C. § 206(d)(1963).
[114] 29 U.S.C.§§2601-2654 (2006)).
[115] For a discussion of constitutional employment law claims, see DAVID W. LEE, HANDBOOK OF SECTION 1983 LITIGATION 279-280 (2009).
[116] 42 U.S.C.§§3601-3619 (2006).
[117] For a discussion of the elements necessary to establish a prima facie case of retaliation, see, *Note: "You're Fired!" Determining Whether a Wrongly Terminated Employee Who Has Been Reinstated with Back Pay Has an Actionable Title VII Retaliation Claim*, 64 WASH. & LEE L. REV. 1663, 1667-1668 (2007).

contexts.[118] At the same time, the study excluded two types of claims because the law and jurisprudence is deeply unsettled in these areas: claims for insurance redlining under the Fair Housing Act and claims challenging allegedly discriminatory policies in the aftermath of Hurricane Katrina in the Mississippi Gulf Region. The study excluded these types of cases because of the fear that including them, when the outcomes in so many of these cases are unfavorable to the plaintiffs because of the unsettled nature of the substantive law and the hostility many courts have exhibited to such claims as a result, would have distorted the results.

- Cases involving no allegations of invidious discrimination.

This rule excluded cases in which Equal Protection violations were alleged in situations involving public employment, public housing or other government conduct, yet the plaintiff failed to articulate a basis for his or her claim that implicated a suspect classification. Similarly, if a substantive law did not forbid the conduct complained of, even accepting the allegations as true and when such allegations were sufficiently specific: e.g., complaints containing allegations of discrimination in employment based on sexual preference were such claims are not covered under federal anti-discrimination laws. At the same time, if a particular motion challenged the specificity of the pleadings on any of these grounds, it was included in the date base. For example, if a defendant challenged a complaint on the grounds a plaintiff failed to state with specificity whether he or she was a member of a protected class, the outcome in that proceeding was included in the data base.

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[118] The burden-shifting approach to Title VII cases in the context of a claim in which discriminatory treatment under Title VII is alleged requires that the plaintiff, in order to make out a prima facie case of discrimination, must show the following:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). For an overview of the burden-shifting framework in employment and other civil rights actions, see, generally, CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN FEDERAL COURT (2009).

- Those decisions where the basis for a defendant's motion was that there was no individual liability under a particular civil rights statute.

As in the previous few bases for exclusion, if individual liability was just a part of a motion in which the sufficiency of the allegations of the complaint was also challenged, the study took into account that aspect of the decision.

In addition to these general grounds for excluding cases, there were additional grounds in individual cases for excluding such cases from the database for this study. A full catalog of the reasons for excluding cases originally flagged for analysis through the searches described above is included in the on-line appendices available for external review.

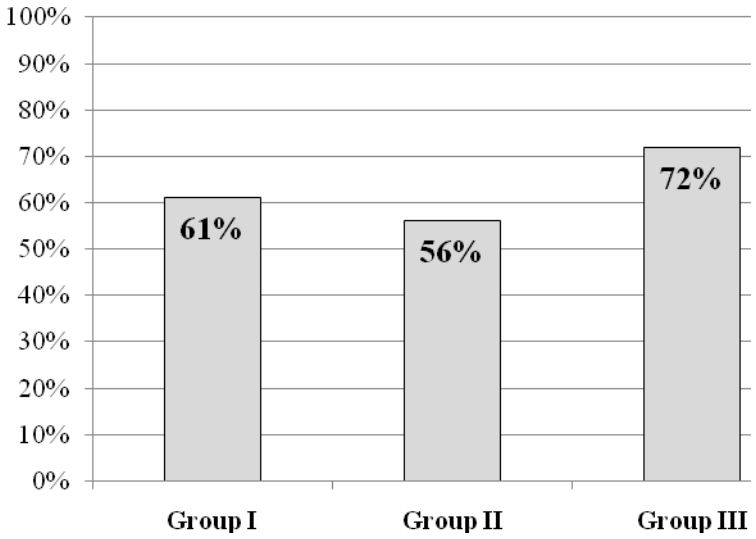
2. Results.

This analysis yielded results that reflected, in most instances, that courts were more likely to dismiss cases, and dismiss them with prejudice, at least in part, after *Iqbal*, than in the time-frame immediately preceding the decision in *Twombly*, and in the period between *Twombly* and *Iqbal*.[119]

For all cases, including those in which the plaintiff was proceeding *pro se* and those in which he or she had counsel, the overall dismissal rates in such cases were as follows: Group I, 61%; Group II, 56%; and Group III, 72%. The change in outcomes from Group I to Group three represented an 18% increase in dismissal rates; surprisingly, the change from Group II to Group III was even more dramatic: a 29% increase.

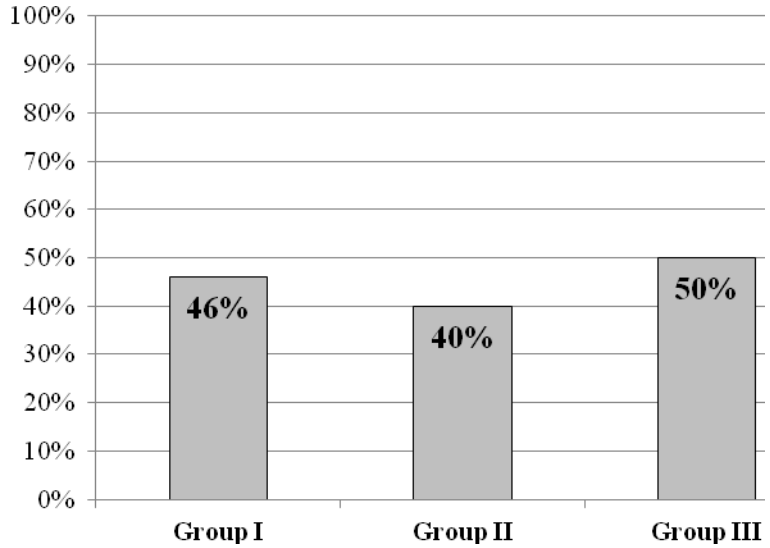
[119] Consistent with the ways in which other studies have categorized motion outcomes, this study classified decisions in which motions were granted, either in whole or in part, as "dismissal granted"; similarly, cases in which any aspect of the motion was granted with prejudice, or the opinion was silent on the matter of whether the motion was granted with prejudice, such decisions were classified for the purposes of this study as "with prejudice" dismissals. See, *supra* note 85.

TABLE 1: Overall Dismissal Rates of Cases in Database



Turning to cases in which dismissal was granted with prejudice, at least in part, the dismissal rates for cases in which at least some claims were dismissed with prejudice were as follows: Group I, 46%; Group II, 40%; and Group III, 50%.

TABLE 2: "With Prejudice" Dismissal Rates

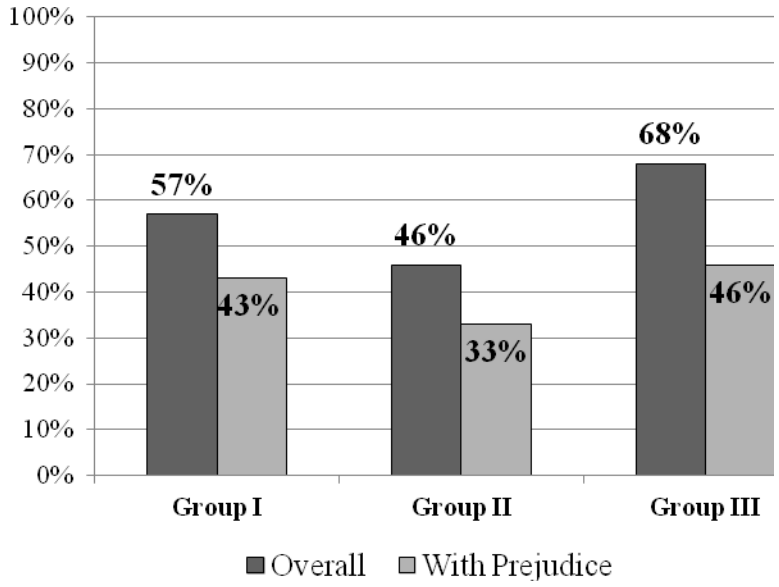


Admittedly, although the overall dismissal rates certainly increased considerably after *Iqbal*, the "dismissal with prejudice"

rate increases only 11% after that decision as compared to the pre-*Twombly* period. Again, the increase from Group II to Group III was more dramatic: a 27% increase.

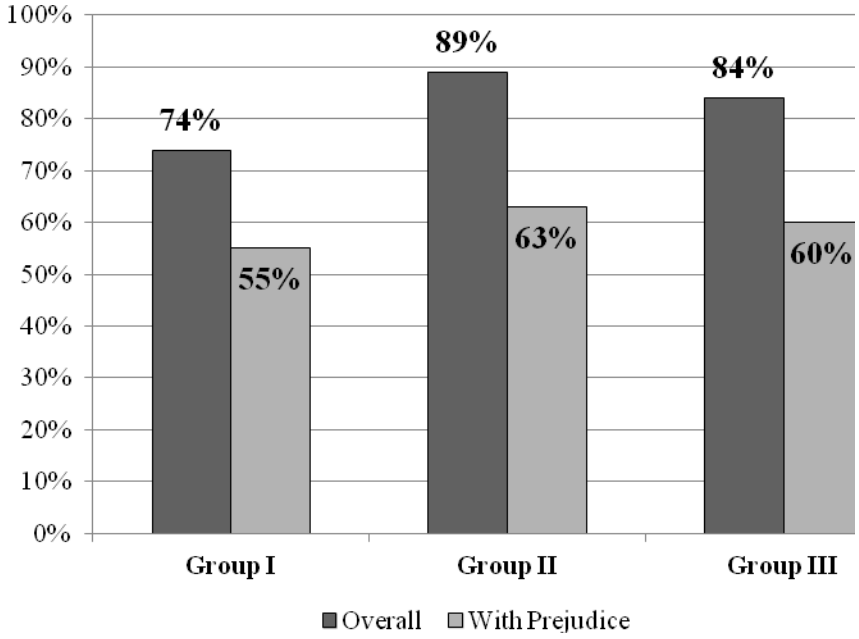
The outcomes in cases in which the plaintiffs were represented by counsel revealed similar trends. In those cases, the overall dismissal rates were as follows: Group I, 57%; Group II, 46%; and Group III, 68%. Turning to cases in which at least partial dismissal with prejudice was granted, for non-*pro se* cases, the results were similar: Group I, 43%; Group II, 33%; and Group III, 46%. These outcomes are displayed graphically below.

TABLE 3: Dismissal Rates for Cases in which Plaintiff Represented by Counsel



Turning to cases in which plaintiffs were proceeding *pro se* yielded somewhat different results, at least with respect to the period between *Twombly* and *Iqbal*. The overall dismissal rates for the *pro se* cases were as follows: Group I, 74%; Group II, 89%; and Group III, 84%. The rates of dismissal in which at least some of the claims were dismissed with prejudice were as follows: Group I, 55%; Group II, 63%; and Group III, 60%. These figures are displayed graphically below.

TABLE 4: Dismissal Rates for Cases in which Plaintiff was *Pro Se*



The data on *pro se* cases shows that *Twombly* and *Iqbal* did seem to have an impact on the overall dismissal rates, but that dismissal rates with prejudice in such cases remained constant. Pro se cases made up roughly one quarter of the cases analyzed (155 of 634 cases, or 24%).

Further analysis of the data yielded interesting results when comparing the outcome in cases in which parties alleged claims of disparate impact as opposed to disparate treatment or other types of related claims, like claims involving retaliation.[120] Further, cases were labeled "mixed" when they involved both claims raising allegations of both disparate impact and disparate treatment.

The results show several different currents. First, disparate impact theories fared much better than disparate treatment claims both before *Twombly* and immediately thereafter. After *Iqbal*, however, they appear to have returned to the mean, though they were still surviving dismissal at a higher rate than disparate treatment cases generally. With mixed cases, at least some of the claims raised by plaintiffs were dismissed at a higher rate than average, and this was across the board during all time-frames. At

[120] For the purposes of this study, the claims were separated into two broad types of cases, disparate impact and all others, a category of cases I have labeled "disparate treatment" because it made up the overwhelming majority of the claims. At the same time, in just a small handful of cases did plaintiffs set forth so-called direct evidence of discrimination, which would take a case out of the burden-shifting framework used in disparate impact and disparate treatment cases generally. This small number of cases was excluded from this study.

the same time, one does see a reduction in overall dismissal rates post-*Twombly* in these cases, with a considerable increase, again, after *Iqbal.* These results are displayed graphically below.

TABLE 5: Overall Results in Disparate Treatment, Disparate Impact and Mixed Cases

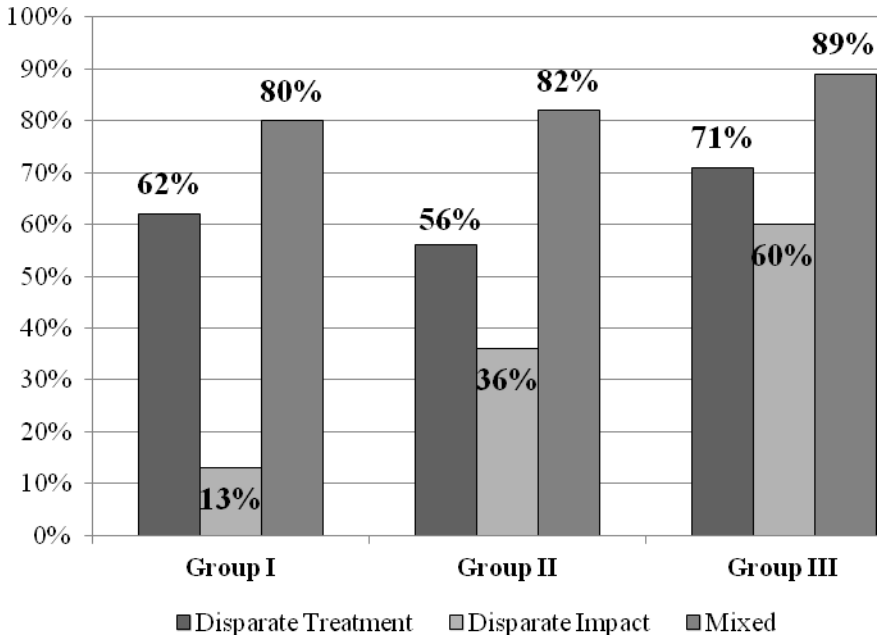
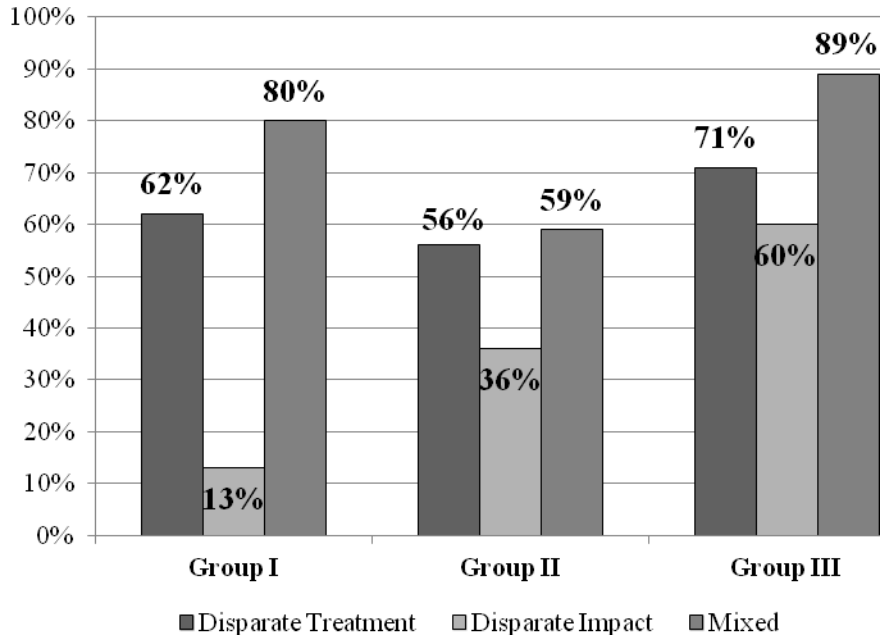


TABLE 6: Dismissal with Prejudice Rates in Disparate Treatment, Disparate Impact and Mixed Cases



An even deeper analysis of the substantive cases included in the study yields an interesting fact. One particular kind of disparate impact case fared much better than other employment and housing discrimination cases in the window of time between the *Twombly* and *Iqbal* decisions. In fact, it is the outcomes in these cases that actually help to explain much of the dip in dismissal rates that occurred after *Twombly* but before *Iqbal.*

This dip is mostly attributable to cases alleging discrimination in the mortgage market in the lead up to the present financial crisis: so-called "reverse redlining" cases.[121] Indeed, of

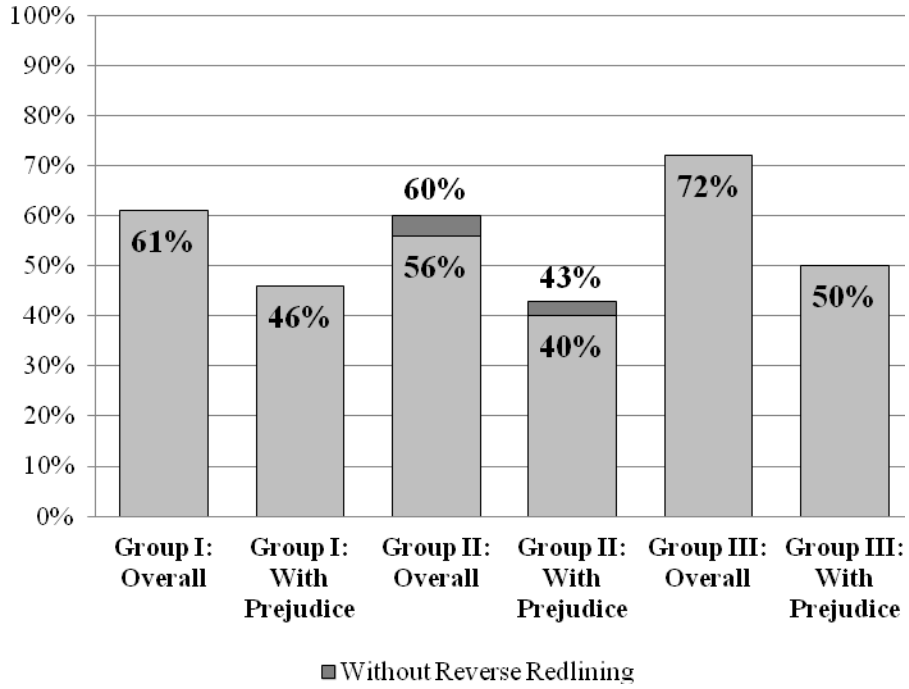
[121] The term "redlining" refers to bank practices of discriminating against certain communities—often communities of color—by not offering bank services there. The term comes from the practice of drawing red lines around communities where a bank would not lend. See, BLACK'S LAW DICTIONARY 1305 (8th ed. 2004)(defining redlining). *See also* Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 Rutgers L.J. 59, 82 n. 116 (2007)(referring to Senator William Proxmire's description of redlining). Reverse redlining refers to the opposite phenomenon: financial institutions targeting certain communities for services on unfair terms. See, Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV. L. REV. 166, 179-180 (2009)(defining reverse redlining). For statistical data supporting claims that subprime lending was more prevalent with borrowers of color during the heyday of the housing bubble in the mid-2000s, even controlling for economic factors, see Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, FED. RES. BULL.

the 13 such cases in which decisions were issued between May of 2007 and May of 2009, only 2 were dismissed and only 1 with any claims dismissed with prejudice.[122] When these cases are removed entirely from the Group II database, the decrease in dismissal rates in the Group II cases almost completely disappears, as the following graph shows.

A123, A125, A159–60 (2006)(showing higher rate of subprime loans going to African-Americans and Latinos, compared to Whites, even controlling for income discrepancies), *available at* http://www.federalreserve.gov/pubs/bulletin/2006/hmda/bull06hmda.pdf; Robert B. Avery et al., *The 2006 HMDA Data*, 93 FED. RES. BULL. A73, A95 (2007)(same), *available at* http://www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final.pdf. For other studies confirming that borrowers of color received subprime loans at a higher rate than White borrowers, again, controlling for creditworthiness and other factors, s*ee, e.g.*, Paul S. Calem, et al., *The Neighborhood Distribution of Subprime Mortgage Lending*, J. REAL ESTATE FIN. & ECON. 393 (2004),; Paul S. Calem, et al., *Neighborhood Patterns of Subprime Lending: Evidence from Diparate Cities*, 15 HOUS. POL'Y DEBATE 603 (2004). For an analysis of racial discrepancies in mortgage pricing even within the subprime market, see Debbie Gruentstein Bocian, et al., Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages (2006), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/rr011-Unfair_Lending-0506.pdf. For the reasons reverse redlining is able to thrive in certain communities, see, e.g., U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 17 (2000), *available at* www.huduser.org/publications/pdf/treasrpt.pdf [hereinafter HUD-TREASURY REPORT] (noting reasons predatory lenders flourish in communities of color); Kathleen C. Engel & Patricia A. McCoy, *The CRA Implications of Predatory Lending*, 29 FORDHAM URB. L. J. 1571, 1583–84 (2002) (arguing that predatory lenders flourish in markets underserved by traditional lenders); *see also* Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 534–40 (2005) (providing overview of economic reasons for failure of the mortgage market to serve certain communities).

[122] These actions typically raise claims under the Fair Housing Act (FHA), and/or the Equal Credit Opportunity Act (ECOA). The FHA makes it unlawful "to discriminate against any person in making available [any real estate related transaction], or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a) (2006), and "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). The ECOA forbids discrimination based on "race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)," if any part of an applicant's income "derives from any public assistance program, or "because the applicant has in good faith exercised any right under this chapter." 15 U.S.C. § 1691(a) (2006).

TABLE 7: Table 1 + Table 2 with Reverse Redlining Removed from Group II



Rulings in a series of cases challenging reverse redlining practices as violations of the Fair Housing Act (FHA), have denied motions to dismiss in these cases, permitting a number of these cases to proceed to the discovery phase.[123]

[123] See, e.g., Ramirez v. Greenpoint Mortgage Funding, Inc., 633 F. Supp. 2d 922 (N.D. Cal. 2008)(denying motion to dismiss); Taylor v. Accredited Home Lenders, Inc., 580 F. Supp. 2d 1062 (S.D. Cal. 2008)(same); Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251 (D. Mass. 2008)(same). For a more comprehensive list of cases alleging the extension of credit on discriminatory terms in the subprime mortgage market, see NATIONAL CONSUMER LAW CENTER, CREDIT DISCRIMINATION 169 n.17 (5th ed. 2009). One case not included in this analysis is an action commenced by the Mayor and City Council of Baltimore against Wells Fargo alleging a pattern of discriminatory lending within city limits. That case has a tortured procedural history, with one district court judge denying the defendants' motion to dismiss, and then another, granting it with reference to Twombly, but because, the judge found, the plaintiffs had not established a plausible argument for why they had standing to sue. The complaint was dismissed several times without prejudice for lack of standing. Most recently, an amended complaint survived the defendants' most recent motion to dismiss and the case is now proceeding to the discovery phase. See, Mayor of Baltimore v. Wells Fargo, 2011 U.S. Dist. LEXIS 44013 (D.C. Md, April 22, 2011). Since the motion to dismiss was based on standing grounds alone, and did not attack the complaint for its sufficiency with respect to the underlying claims, it was excluded from this analysis. See, also, City of Memphis v. Wells Fargo Bank, 2011 U.S. Dist.

The timing of the decisions in *Twombly* and *Iqbal* may help to explain this anomaly; the period between these decisions coincided with a rise in this type of case in the mid-2000s: i.e., the lead up to, and ultimate wake of, the present financial crisis. The plaintiffs in these cases may have been so successful in defeating motions to dismiss for one or more of several reasons: first, they may have benefited from the fact that at least some district court judges were reticent to extend the holding in *Twombly* beyond the anti-trust context; two, perhaps in line with the holding in *Twombly*, judges applied their judicial common sense, given the context to accept the plausibility of the plaintiffs' allegations;[124] or, third, simply put, the complaints in these cases were strong enough to overcome the defendants' motions to dismiss because they contained sufficient allegations to satisfy Rule 8.

While these pre-*Iqbal* decisions indicate a willingness of judges to entertain these claims, even in the face of challenges to the sufficiency of the pleadings, post-*Iqbal*, at least during the period studied, the outcomes in these decisions do not reflect the same acceptance of the claims. Caution is appropriate here, as with the Group II cases as well, given that there were only 7 reported decisions in reverse redlining cases during the post-*Iqbal* time-frame analyzed. In those decisions, 5 were dismissed (71%), 3 (43%) with at least some of the claims dismissed with prejudice. These numbers are consistent with Group III's general trends.

D. The Lasting Value of the "Plausibility" Standard from *Twombly* and *Iqbal.*

The next review of the decisional law following *Twombly* and *Iqbal* tested the manner in which courts deployed the so-called "plausibility standard" utilized by the Supreme Court in these two cases. This review yielded somewhat surprising results. The review consisted of assessing those decisions in the data base of cases decided after the Court's decision in *Iqbal*[125] in which the specificity of the pleadings were challenged by defendants to determine to what extent courts used the plausibility standard in

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LEXIS 48522 (W.D. Tenn., May 4, 2011)(denying motion to dismiss on standing grounds).

[124] Given the findings below regarding the extent to which judges are applying their "common sense" given the context, see section XXXX, it is doubtful that this explanation carries much weight.

[125] To the extent some courts may have been reluctant to apply *Twombly's* plausibility standard to cases outside the context of anti-trust actions, *Iqbal's* application of the standard to a broader class of cases appears to have signaled to trial courts that the standard is applicable in all civil cases. Accordingly, this final piece of this review of T*wombly* and *Iqbal's* impact focuses only on post-Iqbal decisions.

that assessment or did not. This final review was conducted in the following manner.

1. Methodology

This review looked at the largest group of cases in the data base in which motions to dismiss were granted in their entirety: cases in Group III in which non-disparate impact claims were raised exclusively. The assumption was that with these cases, one is likely to see courts utilizing the plausibility standard to dismiss cases with the most enthusiasm. These opinions numbered 99 in total, and the analysis invoked the following methods for assessing these outcomes.

First, the analysis identified those decisions in the data base in which the plausibility standard was invoked in a substantive way: i.e., using either or both of the cases and the plausibility standard they introduce in a way that goes beyond a mere recitation of the motion to dismiss standard under Rule 8. Then, second, where the term "plausibility" or "plausible" was utilized by a deciding court in reaching a decision on the substance of the claim or claims in question in a particular case, the analysis categorized the manner in which the standard was applied.

In this analysis, cases were classified as follows: first, on whether the deciding court used the "more plausible" standard articulated by the Court in *Twombly* and *Iqbal*. Second, the review determined whether the deciding court invoked these precedents to deny so-called conclusory allegations the presumption of truth in the face of the motion to dismiss. Third, the review asked whether courts were assessing the allegations in light of the "context" of the claim, as urged by the Court. Finally, the review classified those cases in which the deciding court, while explicitly invoking the term plausibility, did little more than assess whether the complaint in a particular case failed or succeeded in setting forth the basic elements of an underlying claim or claims, as opposed to testing any plausibility of those claims.

2. Results.

In the end, only rarely did the application of the plausibility standard by the deciding court resemble the way the Supreme Court applied it in *Twombly* and/or *Iqbal*. First and foremost, in roughly half of the cases reviewed, deciding courts failed to even apply *any* plausibility standard at all. Rather, if the *Twombly/Iqbal* precedents were cited, they were often invoked simply in boilerplate language articulating the new standard for deciding a motion to dismiss. Despite citing this language initially, roughly half of the courts went on to disregard it altogether, proceeding to

ruling on the motion to dismiss without applying any plausibility standard to the underlying claims.

Moreover, even where courts may have called upon the plausibility standard in some substantive fashion, district courts rarely invoked the plausibility standard in a way that seemed central to the Court's holdings in *Twombly* and *Iqbal.* As described above, the Court in those two cases compared the plaintiffs' allegations in those cases as against what were considered "more plausible" explanations for the defendants' conduct in each case; these alternative explanations, in the eyes of the Justices, were entirely lawful (I call this the "More Plausible Test"). Unlike the Supreme Court, in the decisions reviewed in this study, district courts rarely applied the plausibility standard in this way: that is, they simply did not assess whether the plaintiffs' claims were more or less plausible than entirely lawful explanations for the defendants' conduct. In fact, in only four of the cases in the group of 99 did district courts appear to apply the More Plausible Test.

Instead, when courts did invoke the term plausibility when testing the specificity of the complaint, what they appear to be doing, far more often than not, is finding the allegations lack sufficient specificity to establish that the plaintiff can make out the elements of his or her particular claim for relief, without any regard for whether those factual contentions were plausible or not. In other words, though purportedly invoking the plausibility standard, if at all, courts did, most often, simply apply a relatively straightforward, and traditional, Rule 8(a) analysis: i.e., they asked whether the plaintiff set forth the basic elements of his or her claims to put the defendant on notice of the nature of those claims.

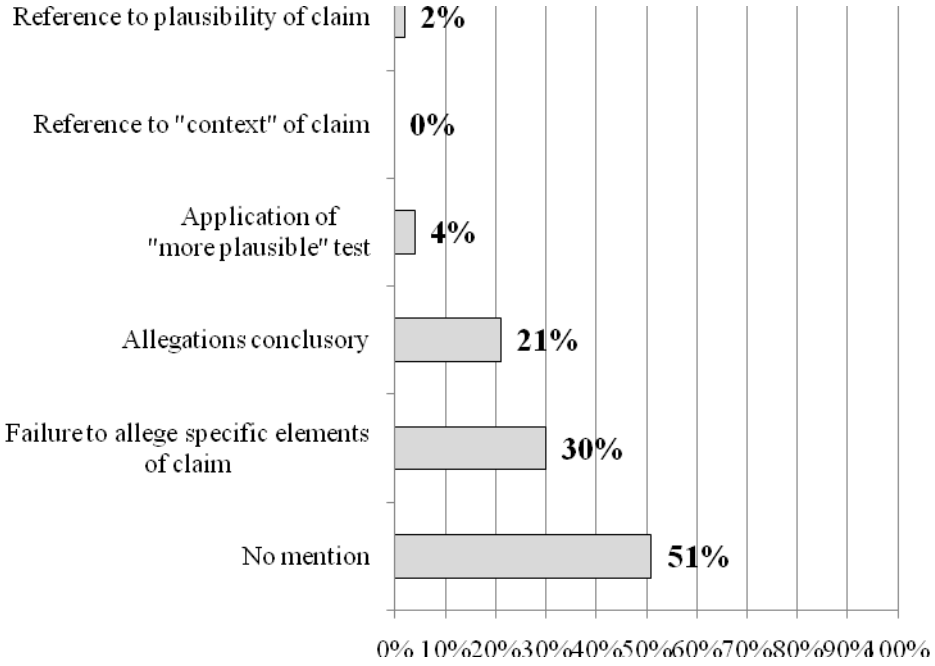
In other cases in which the plausibility standard was actually invoked in more than mere boilerplate language, courts found that the plaintiffs made no more than conclusory allegations in support of their claim, and such allegations, under *Twombly* and *Iqbal*, were not entitled to deference when ruling on the defendants' motion to dismiss. But such holdings have little to do with whether the underlying claims were plausible or not.

To some extent then, perhaps the most wide-ranging impact and most important legacy of *Twombly* and *Iqbal* is that courts have focused in on the prominence the Court gave in those opinions to the rejection of conclusory allegations, even if under the mantle of conducting a plausibility analysis.[126]

[126] This rejection of so-called conclusory allegations, of course, raises the specter that the Court is returning pleading standards to the Field Code era, where litigants could only cite ultimate facts, and not conclusions or mere evidence. See text accompanying footnotes XXX through XXX, *supra.*

The following table shows the frequency and quality of the manner in which district courts invoked the *Twombly/Iqbal* plausibility standard. Since several courts applied several aspects of the plausibility standard in a single opinion, the combined percentages exceed one hundred percent.

TABLE 8: Analysis of Application of Plausibility Standard



Given that (a) in roughly half of the cases in this subset of cases the plausibility standard was not even invoked and (b) in only a small handful of cases did the court use the MPT, as opposed to simply rejecting allegations for their lack of specificity, or, in a smaller number of cases, because they were conclusory, it would appear that one of the more confounding and troubling aspects of the *Twombly* and *Iqbal* decisions – that is, the Supreme Court's use of the plausibility standard to weigh the relative likelihood that conduct complained of was illegal or legal – is not, for the most part, being followed by the district courts.

E. Rate of Motions.

1. Methodology.

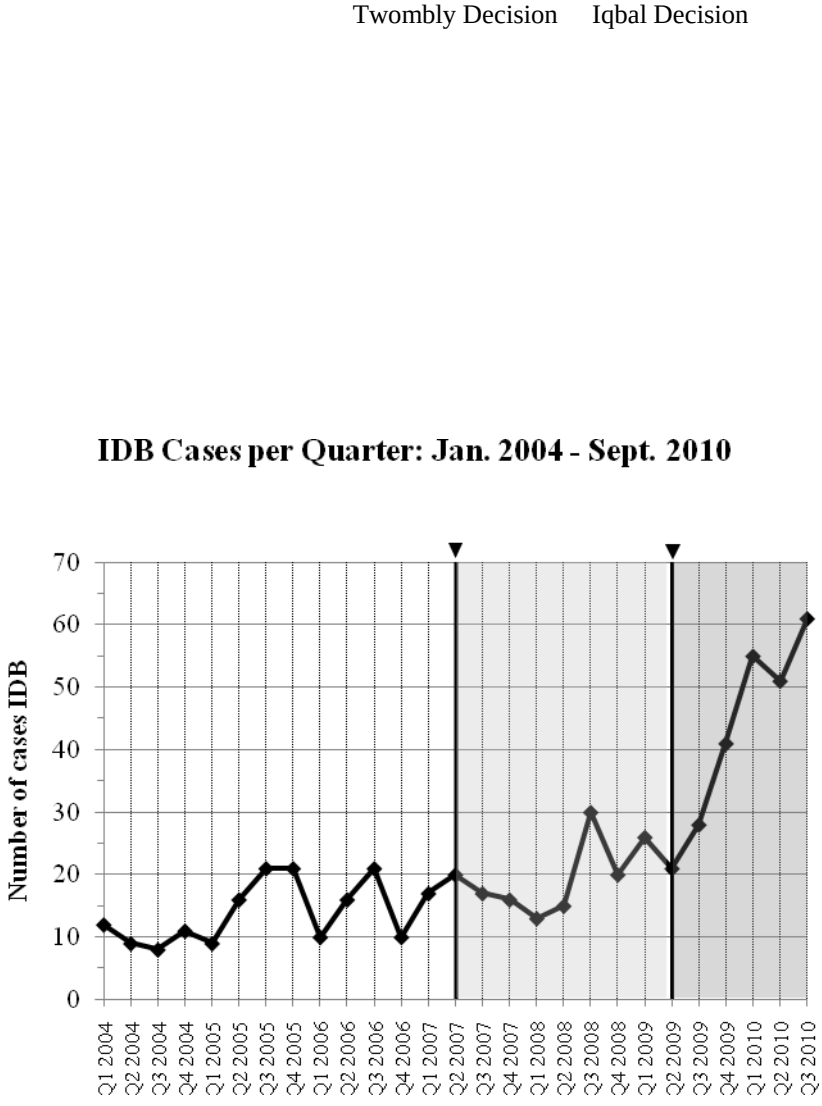
For this analysis, the study simply looked at the number of cases in which decisions were reached on motions to dismiss in which defendants challenged the specificity of the pleadings. For the pre-*Twombly* period, as more fully described above, the study conducted a number of different searches to identify as many cases

as possible that might have involved challenges to the specificity of the pleadings, regardless of whether *Conley* was cited in those decisions. Similarly, the study involved additional searches of the post-*Twombly* and post-*Iqbal* periods that included cases in which the specificity of the pleadings were challenged, whether the deciding court cited *Twombly* and/or *Iqbal* or not. This analysis yielded a raw number for each time period (and this number became the cases analyzed for further study). In addition to the further analysis, however, the study identified the average number of decisions included in the data base based on their date of issuance, compiling a raw number per calendar quarter based on that date. A word of caution here: I am only claiming that of the 1,800 cases analyzed, the rate at which motions to dismiss based on specificity of the pleadings were filed accelerated considerably within this data base in the months after issuance of the *Iqbal* decision. Certainly further study is needed on this issue, for sure, particularly analysis that is based on all case filings, and all reported and unreported decisions.

2. Results.

The results of this analysis yields the time line set forth below. As one can see, the number of decisions issued per quarter, on average, rises slightly after *Twombly*, but then increases dramatically after *Iqbal.* Indeed, the number of decisions on such motions in the first quarter of 2004 was only 12. In contrast, courts issued sixty one such decisions in the last full quarter of the study, the third quarter of 2010: a greater than 500% increase.

TABLE 9: Timeline



F. Experience and Common Sense.

Finally, the study involved one last analysis: an assessment of the extent to which judges make explicit reference to their own "experience and common sense" when reaching their decisions on the motions to dismiss included in the data base. Here, the study analyzed the entire post-*Iqbal* data base[127] of cases where judges reached decisions on the specificity of the pleadings. In only one cases did a deciding judge make reference to his own experience and common sense, and there, only tangentially.[128] That is not to say that there were not cases in which courts made reference to terms like "experience" and "common sense" in boilerplate language; but in only this one case did an opinion reference a judge's experience and common sense explicitly in reaching a decision on a motion challenging the specificity of the pleadings.

CONCLUSION

Over time, the Supreme Court's decisions in *Twombly* and *Iqbal* may serve as historical landmarks in federal civil procedure, indicating the moment when the court house doors were closed a little narrower on plaintiffs seeking to vindicate important federal rights. The results of the instant study reveal that it is the *Iqbal* decision that appears, at least during the time-frame studied, to have had the greater impact on litigants asserting employment and housing discrimination claims in federal court. But that impact is both more and less severe in different ways.

There does appear to be an *Iqbal* effect, both in terms of dismissal rates and in the frequency of motions to dismiss based on challenges to the sufficiency of the pleadings. Not only are cases being dismissed at a higher rate since *Iqbal*, but also, plaintiffs are being forced to defend themselves on these grounds far more often than before, meaning significant transactions costs. In turn, this phenomenon may have a chilling effect, discouraging plaintiffs'

[127] The study only analyzed the post-*Iqbal* cases because the phrase "experience and common sense" comes from *Iqbal*, not *Twombly*.

[128] See, Jones v. N.Y.C. Dep't of Hous. Pres. & Dev't, 2010 U.S. Dist. Lexis 107360, *6-7 (E.D.N.Y. 2010)(Dearie, J.)(finding experience and common sense should dictate that any fair reading of the complaint meant it should be construed as a housing discrimination case and not an employment discrimination case, contrary to the arguments of the plaintiff who sought leave to amend his complaint to change his theory of recovery). In a separate case, one judge utilized "common sense" when assessing whether a plaintiff had exhausted her administrative remedies, but this was otherwise unrelated to the sufficiency of the pleadings. See, DD v. Lincoln Hall Ives Sch., 2010 U.S. Dist. Lexis 15511, *30-31 (S.D.N.Y. 2010)(finding that it defied common sense that a plaintiff was too disabled to include certain charges in her administrative complaint when she was able to assert others).

attorneys from agreeing to handle certain cases if they fear they will face the prospect of motions challenging the plausibility of their claims, a standard, as has been shown here, that is somewhat elusive.

It is in the *application* of the plausibility standard to test the specificity of the pleadings that we see that the Court's opinions in *Twombly* and *Iqbal* themselves have, perhaps, had less of an impact, however. That is, courts are rarely referring to the plausibility standard in any substantive way at all. Moreover, district court judges almost rarely use it in the manner in which the Court did in both decisions: i.e., they do not deploy a "more plausible" rubric to test the specificity of pleadings. Finally, courts almost never—at least not explicitly—refer to their own experience and common sense, as urged by the Court, in testing the those pleadings.

In some ways, it is grounds for relief that courts are not using the plausibility standard in the same manner in which the Court did in *Twombly* and *Iqbal*. That courts are not invoking the More Plausible Test reveals, in practice, it does not seem useful, practical or relevant to the day-to-day workings of district court judges.

Additionally, that judges appear reticent to invoke something as subjective as their own experience and common sense is also encouraging (which is not to say that judges may not do that, they just may be more guarded about admitting they are doing so, or may be doing so subconsciously).

Underneath the reality of how these precedents are being deployed—that is, that courts are using them without reference, generally, to the plausibility standard, or the manner in which the Court used it in particular—lies a simple truth: in employment and housing discrimination cases, courts appear to have dismissed cases at a higher rate during the period studied. The fact that district courts did not use *Twombly* or *Iqbal* in the manner contemplated by the Court, yet dismissed these cases more frequently, suggests that at least some judges may feel emboldened to dismiss cases after *Iqbal* regardless of the standard they may or may not invoke.

The lasting durability of the plausibility standard, itself, thus appears shaky; the impact of *Iqbal*, however, appears significant nonetheless. To the extent that this precedent impacts important federal rights by giving judges the freedom to dismiss cases that may seem inconsistent with what judges feel "in their gut,"there is grave cause for concern.[129]

[129] With this language, one is drawn to a term made famous by late night comedian Stephen Colbert. That judges are asked to invoke their common sense is not unlike Colbert's now famous statement about "truthiness": truth that

This study reveals that two things appear to be happening: these types of discrimination cases are being dismissed at a higher rate since *Iqbal*, and, at the same time, judges appear to be mostly ignoring the text of *Iqbal* and the instructions the Court gave for how district courts should apply the plausibility standard. Thus, courts are using *Iqbal*, but not its plausibility standard, to dismiss certain classes of cases at a higher rate.

These developments may suggest, then, that the subjective elements of the plausibility standard, even if not being invoked explicitly, may be creeping into judicial decision making nonetheless, resulting in more dismissals of civil rights cases in the employment and housing discrimination contexts. I do not doubt that, for some, this may be cause for celebration. For others, it will give pause and confirm their fears about the lasting impact of *Iqbal* on important federal rights.

"comes from the gut, not books". Stephen Colbert, Comedy Central's "The Colbert Report,"(Comedy Central television broadcast Oct. 18, 2005), *available at* http://www.comedycentral.com/videos/index.jhtml?videoId=24039.
See, also, American Dialect Society, January 2006, Merriam-Webster's Online Dictionary (2006)(defining truthiness as "the quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true").